No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-877

JAMES G. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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James G. Ryan, by and through his undersigned counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circut in this case.

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. A, *infra,* pp. 1a-13a entered May 24, 1976, is not yet officially reported.

The order of the Court of Appeals on November 29, 1976, denying rehearing en banc, and modifying the panel opinion, together with the dissenting opinion of Hufstedler, Circuit Judge, concurred in by Ely, Circuit Judge (App. B, *infra,* pp. 14a-22a) was ordered not to be published.

The order of Circuit Judge Trask staying issuance of mandate, entered on December 9, 1976, appears at App. C, *infra,* p. 23a.

The trial court's unpublished post-trial memorandum regarding petitioner's motion to strike and exclude evidence, entered April 3, 1974, appears at App. D, *infra,* pp. 24a-35a.

The revised opinion of the Court of Appeals, entered on November 30, 1976, appears at App. E, *infra,* pp 36a-55a, and

includes the dissenting opinion of Circuit Judge Hufstedler, concurred in by Circuit Judge Ely.

JURISDICTION

The court of appeals opinion was entered on May 24, 1976. A motion for rehearing and a suggestion for rehearing en banc was denied by an order of the court of appeals entered on November 29, 1976, which modified the opinion. An order staying issuance of the mandate pending the filing of this application was entered on December 9, 1976.

The jurisdiction of this case was initiated by criminal indictment of a federal grand jury, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the subject, Mizera, voluntarily consent to official interception of his wire and oral communication where the trial court found, on undisputed evidence, that state officers accosted Mizera, threatened him with immediate arrest and imprisonment for 10 years, offered not to prosecute him if he "cooperated," told him otherwise he would lose his livelihood, damage his family, and be deprived of special medical treatment for severe headaches, and answered his request to call a lawyer by saying he could, but if he did, the "deal" was off.

2. Is there any difference in the constitutional standards which apply in determining the voluntariness of a "consent" to participant, electronic monitoring under 18 U.S.C. 2511(2)(c), from the standards which apply in determining the voluntariness of a confession, a guilty plea or a consent to search?

3. Does the Travel Act apply to a county official who is offered a "campaign contribution" by a local real estate agent for a zoning change of local real estate owned by a resident of California?

4. Is mere passivity with respect to an offer of a political contribution for approval of a zoning change, enough to establish membership in a criminal conspiracy and also constitute one an aider and abetter of substantive travel act offenses committed by others?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .

3. 18 U.S.C. 2511(2)(c) provides in pertinent part:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where one of the parties to the communication has given prior consent to such interception.

4. 18 U.S.C. 2515 provides, in pertinent part:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . in or before any court . . . of the United States, . . . if the disclosure of that information would be in violation of this chapter.

5. 18 U.S.C. 1952, the Travel Act, provides, so far as pertinent:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) . . .
>
> (2) . . .
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the

acts specified in subparagraph . . . (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . . (2) . . . bribery . . . in violation of the laws of the State in which committed . . .

STATEMENT OF THE CASE

STATUS

On March 23, 1974, petitioner, James G. Ryan, was found guilty of both counts of an indictment charging that he conspired, in 1972, with codefendants Wilson and Zeldin, and unindicted coconspirator Miro (Mike) Mizera, to violate the Travel Act with respect to bribery of public officials contrary to Nevada law, and that he aided and abetted the commission of substantive violations of the Travel Act by codefendants and Mizera. On January 29, 1975, he was adjudged convicted and sentenced to two consecutive, five-year terms of imprisonment.

On May 24, 1976, Ryan's conviction was affirmed by a panel decision of the Ninth Circuit Court of Appeals.

Ryan filed a motion for rehearing and a motion for rehearing en banc. On November 29, 1976, the panel modified its opinion by substituting a more complete statement about the way state agents obtained the "consent" of Mizera to serve as a state agent, to obtain evidence incriminating Ryan, and to permit official monitoring of his wire and oral communications with Ryan. Rehearing and rehearing en banc were refused.

Circuit Judge Hufstedler, with the concurrence of Circuit Judge Ely, dissented from the denial of a rehearing, and considered that Ryan's case should have been reheard en banc to eradicate an intra-circuit conflict between the panel decision as to the "voluntariness" of Mizera's cooperation, and the case of *United States v Rothman,* 492 F2d 1260 (9th Cir. 1973) and its antecedents.[1]

1. The antecedent cases included *Schneckloth v Bustamonte,* (1973) 412 US 218; *Bumper v North Carolina* (1968) 391 US 543; *Lynum v Illinois,* (1963) 372 US 528; *Shotwell Mfg. Co. v United States,* (1963) 371 US 341; *Rogers v Richmond,* (1961) 365 US 534; *Johnson v United States,* (1948) 333 US 10; and *Bram v United States,* (1897) 168 US 532.

Specifically, Circuit Judges Hufstedler and Ely were of the opinion that the determination whether consent to participant monitoring of wire and oral communications is voluntary, is to be governed by the same constitutional standards which apply to the voluntariness of confessions, guilty pleas and searches. They also were of the view that neither the trial court, nor the panel, had applied the constitutionally required tests of voluntariness, and that the "consent" of Mizera, on undisputed evidence, was plainly involuntary.

On the merits of this issue, Circuit Judges Hufstedler and Ely would have reversed Ryan's conviction and remanded the case for a new trial free from the tainted evidence.

The panel decision rejected Ryan's contention that evidence of his purely local involvement on a rezoning matter established the commission of a federal offense under the rule of *Rewis v United States,* (1971) 401 US 808.

The panel upheld Ryan's aiding and abetting conviction solely on the basis that he should have "rebuffed" Mizera's talk about "campaign contributions." Ryan's passivity to Mizera's approaches, and his continued belief in the appropriateness of the rezoning for the land in question, was deemed to prolong the life of the bribery conspiracy and aid the scheme, and thereby aid and abet the substantive violations, although their occurrence was wholly unknown to him.

The panel expressly did not condone the tactics used by state officers to get Mizera's "cooperation," but refused to find that such conduct was so grossly shocking and outrageous as to violate a universal sense of justice, under *Rochin v People of California,* (1952) 342 US 165, or the dictum of *United States v Russell,* (1973) 411 US 423.

THE FACTS

Ryan was a county commissioner. Miro (Mike) Mizera had escaped from Czechoslovakia as a young man, when Communists obtained control of the country, and had become a United States' citizen. He was a self-employed, licensed real estate broker in Las Vegas. He suffered from chronic headaches so painful

they were incapacitating and he depended heavily on drugs during attacks. He had succeeded in finding and getting an appointment with a medical specialist in New York City. Mizera had all his hopes pinned on this doctor for relief from pain, but he needed money to keep the appointment and pay for expensive treatments.

Looking around for a way to make money, Mizera came upon a 65-acre tract of unimproved land which was owned by Adrian Wilson, a Los Angeles architect. The land was zoned for construction of only two housing units per acre. Mizera saw that rezoning to a limit of four housing units per acre was feasible in the land area and that rezoning would make for greater saleability of the sites and more profitable commissions for him.

Mizera went to Wilson in California for a brokerage contract and approval to seek rezoning. Mizera had already been stung by failing to get rezoning of another tract, where rezoning had even been recommended by a subordinate planning board. From that experience, and anonymous street talk, Mizera was invincible in the belief that "political contributions" were prerequisite to rezoning.

Mizera expressed his conviction to Wilson and proposed that Mizera would try to get the rezoning and would make political contributions to the commissioners from money Wilson would pay him for rezoning work.

Mizera went to Ryan in Las Vegas and explained the rezoning application. Without any mention of a "political contribution" by Mizera, Ryan approved the proposal on its merits. Mizera, nevertheless, was still convinced that political contributions were needed. Mizera arranged further meetings with Ryan where Mizera did mention political contributions for the commissioners. Ryan ignored these overtures, but continued to discuss the zoning change, which he favored all along as beneficial for the community.

At one meeting, Mizera told Ryan his portion of the contribution fund was reduced because of the need to contribute to other commissioners. Ryan was angered, said he didn't want any part of it and walked off.

Meanwhile, Mizera saw Commissioner Broadbent and offered a contribution for Broadbent's help in moving and voting for rezoning. Broadbent feigned complicity, and immediately called

the State Attorney General to report an offer of a bribe. From that point on, Broadbent became an active undercover agent and had further talks with Mizera which were officially monitored.

A Mizera-Broadbent conversation on April 27, 1972 was intercepted and recorded, from which the officers knew they had hard-core evidence of Mizera offering a bribe to Broadbent. The officers decided not to proceed against Mizera on the possibility that he might be involved with other commissioners. The trial court found that as early as May 2, 1972, the state investigation was focused on Ryan.

On May 4, 1972, the officers got an order to intercept phone calls at Mizera's office and home. The application for these wire interceptions was purportedly directed at Mizera, and the issuing judge was not told that the officers already had a case made against Mizera and that they were going for Ryan. At the trial, the Government did not rely on this interception order as a basis for admissibility of tape-recordings.

The interception of Mizera's phone calls, and personal surveillance was not producing any incriminating evidence against Ryan. So, on May 17, 1972, by pre-arrangement with state officers, Broadbent called Mizera and told him Broadbent was withdrawing from making the rezoning motion or voting for it. This tactic prodded Mizera to another meeting with Ryan, where Ryan said he would make the motion.

Ryan testified Mizera was objectionable, but Ryan did not believe he should fail to vote his genuine conviction on a rezoning application simply because a proponent was out-of-line.

The evidence is undisputed, and corroborated in detail, that Ryan (1) never approached any fellow commissioner about the rezoning; (2) never met with defendant Wilson (though the two men had been introduced some years previously); (3) never met with or knew defendant Zeldin, a Las Vegas contractor who wanted to construct housing units on the Wilson tract after rezoning; and (4) never traveled or communicated across state lines or had any knowledge of such acts by the codefendants or Mizera.

On May 18, 1972, state officers moved in on Mizera and "turned" him into a state agent to get incriminating evidence

against Ryan. This meeting was transmitted to and recorded by state agents.

The state officers already had a lot of information on Mizera from Broadbent and from their own electronic and personal surveillance of Mizera. They knew about his headaches, the drugs he took, that he was desperate to get to the doctor in New York City, and that he had a wife and young son.

Armed with this knowledge, Deputy Attorney General Ahlswede called Mizera for an appointment, posing as a builder named "Thompson" who wanted to discuss a land purchase. At the appointed time, Deputy Ahlswede and two investigators appeared at Mizera's office, identified themselves as members of a "strike force," told Mizera he was guilty of bribery of an official, read him the statute, revealed the evidence they had amassed against him, told him they were ready to arrest him immediately and that he would go to jail for 10 years unless he "cooperated" with them. They refused to listen to his protestations that he had not broken any law and loved this country. They told Mizera if he refused to "cooperate" they had no alternative but to take him to jail and book him for bribery. Deputy Ahlswede said: "I can assure you, you'll go to jail for ten years. You will lose your real estate license. You will lose any chance of making any money out of this land deal or any other deal. You are in deep, deep trouble, Mr. Mizera."

Mizera asked if he could talk to an attorney. Deputy Ahlswede told him his usefulness to them would be over if he consulted an attorney — that Ahlswede did not have faith in some of the attorneys in Las Vegas. Ahlswede said an attorney might consider Mizera "too insignificant a person to worry about" and might go to the commissioners and disclose the investigation. Ahlswede requested that Mizera not take any incoming phone calls. Ahlswede told Mizera he could call an attorney, but if he did, the offer of a deal was over. Mizera protested that it was unfair to be taken to jail and not even have a chance to talk to an attorney. Ahlswede said an attorney would compromise the investigation and end Mizera's usefulness to them.

Continuing in this vein, Ahlswede said the investigators had enough on Mizera to send him to prison for 10 years. Ahlswede

said, "I don't know what your little boy is going to think about that or your wife."

The following was said:

Ahlswede:

> . . . I know you've got headaches. You're not going to be able to go back to ah . . . you're not going to be able to go back to New York in July . . . to get ah your headaches, but *** what is it, Darvon and Percodan that you're using . . .

Mizera:

> . . . If I don't get medicine from doctor . . . in New York . . .

Ahlswede:

> Well, there's only one man that can help you at this point and that's the Attorney General.

Mizera:

> Ah, one more . . . it's one more escrow to allow me to go to New York for these expensive treatments . . . $135 a day to help . . . and ah . . . I have another case on that . . . zoning coming up[2]

The state officers told Mizera they were not interested in prosecuting Wilson or Zeldin. They wanted Mizera just to talk to Ryan, "He's the only one we're interested in." The officers proposed a conversation Mizera should have with Ryan. One of the officers cautioned against saying anything that would "spook" Ryan, or Ryan "might cancel the whole thing." Mizera asked, "Then you nail me?" Mizera was told, "That's the name of the game, Mike."

Confronted with such threats and coercion, Mizera "consented" to cooperate only because, as he was later to testify, he had no choice.

After a "dress rehearsal" conducted by the officers, Mizera

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[2]. This excerpt is quoted from a transcription of the tape-recorded meeting. Asterisk symbols indicate inaudible parts of the tape. Multiple periods (. . .) indicate pauses in the statements or interruptions.

was wired with a transmitter and taken to see Ryan. Mizera talked about money and tried to get Ryan to talk about money, but Ryan was wholly unresponding.

On May 22, 1972, the commission met, Ryan moved for rezoning and the motion carried. That afternoon there was a Mizera-Wilson-Zeldin meeting and Mizera was given money to take to Ryan. On May 23, 1972, Mizera went to Ryan's home and tendered $5,000 to him. Ryan took the money in his hand and was immediately arrested.

Long before the commission meeting, Ryan had been warned of action by the Attorney General. On April 28, 1972, Attorney Morris told Ryan the Attorney General was out to get one or more of the commissioners. On May 16 or 17, 1972, Attorney Olsen told Ryan the Attorney General was out to "nail" Ryan.

After the commission meeting, Ryan talked to Attorney Morris about what Ryan should do if Mizera did offer him money. Morris told Ryan to play along, take the money and turn it over to the District Attorney. Ryan followed this advice, but his arrest prevented fulfilling the plan of going to the District Attorney.

Ryan's arrest was widely publicized, but federal investigation or prosecution was not undertaken then. The Nevada Attorney General's office prosecuted Ryan alone under a state criminal complaint filed on May 24, 1972. Before a preliminary hearing was held on the complaint, the Attorney General took the investigation to a county grand jury. On June 15, 1972, the county grand jury returned a "no bill" as to Ryan. The Attorney General's staff then resumed prosecution on the criminal complaint. A preliminary hearing was held and on July 25, 1972, the magistrate determined there was no probable cause to hold Ryan for trial and discharged him. Next, the Attorney General got a court order purportedly authorizing him to file a direct criminal information against Ryan. Such an information was filed on August 8, 1972, but was held to be beyond the state constitutional and statutory power of the Attorney General, because the prosecutor's function was then vested solely in the district attorney (*Ryan v Eighth Judicial District Court*, Nev 1972, 503 P2d 842).

After Ryan's discharge for lack of probable cause, the district attorney was empowered by NRS 178.035 to apply to the court for leave to file a direct information within a 15-day period. This period lapsed without action by the district attorney, with the result that any further state prosecution was barred under the limitation provision of NRS 178.562(2). No state prosecution was ever brought against Wilson, Zeldin or Mizera.

This federal prosecution was commenced by indictment filed April 27, 1973 — that is, after any further prosecution of Ryan by the State of Nevada had been abandoned and barred by limitations.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, and should be, settled by this Court — that is, what standards are to be applied in determining the voluntariness of consent to participant monitoring of wire and oral communications under 18 U.S.C. 2511(2)(c)?

The Court of Appeals "did not condone" the coercion of Mizera and would have preferred that the state officials had "shown more restrain." But the court of appeals did not deal with the facts of coercion in accordance with controlling decisions of this court where an issue of coercion has been raised under the Fourth and Fifth Amendments.

Bram v United States, (1897) 168 US 532, held coercion need not take the form of physical torture; if any degree of influence was exerted against a prisoner, by any form of coercion, threat or promise, the prisoner's confession must be excluded from evidence because the law cannot measure the force of the influence used or decide its effect on the prisoner's mind. In *Lynum v Illinois,* (1963) 372 US 528, a confession secured by threats that the defendant "could get 10 years and [that] the children could be taken away" unless she "cooperated" was held to be involuntary. *Shotwell Mfg. Co. v United States,* (1963) 371 US 341 held that evidence procured under a promise of immunity could no more be regarded as the product of a free act, than evidence obtained by official physical or psychological coercion. *Rogers v Richmond,* (1961) 365 US 534, held

that the uncounseled confession of a defendant who was threatened that his wife would be brought in for questioning was involuntary.

Similarly, where a "consent" to a search is obtained through a misrepresentation of the officers, or is in acquiescence to a claim of lawful authority, such consent may not be relied on to validate the search and seizure. *Bumper v North Carolina,* (1968) 391 US 543. *Schneckloth v Bustamonte,* (1973) 412 US 218, also recognized that the Fourth and Fourteenth Amendments "require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." However the coercion is applied, the "consent" obtained is not more than a pretext for an unjustified police intrusion against which the Fourth Amendment is directed.

Instead of following the precepts of this Court and focusing upon the acts of the state officers against Mizera, the Court of Appeals assumed Mizera was guilty without a plea of guilty or a trial and conviction. The Court of Appeals regarded Mizera as having brought his plight upon himself. The Court of Appeals ignored that the guilt or innocence of a subject sought to be "turned" into an undercover agent and do the bidding of officials in engaging in pre-rehearsed wire and oral communications, is not decisive and is immaterial to the issue of whether he was coerced into "cooperation."

The Court of Appeals seeks to equate Mizera's situation with that of one who in the face of criminal charges against him, with knowledge of the evidence in the hands of the prosecution, and with an understanding of the perilousness of a trial and the consequences of a conviction, may elect to plead guilty to an offense. But the Court of Appeals ignores that in such a case the defendant is before a judicial officer and he has had the advice of counsel and has counsel present with him. Even in those circumstances, the court must scrupulously inquire of the defendant whether he has been threatened or coerced by any form of promise or inducement to enter his plea. Moreover the defendant must be questioned as to whether he intentionally committed the acts charged against him. *Brady v United States,* (1970) 397 US 742.

The Court of Appeals amended its opinion to include a

lengthy footnote reference to the trial court's memorandum on this issue in which the lower court focused on the fact that after the state agents confronted Mizera, Mizera capitulated to their demands "in a matter of minutes," and volunteered suggestions on how to proceed with the investigation. Again, inquiries of this sort do not address the constitutional issue of whether Mizera's initial "consent" was coerced. If it was, then whatever flowed from that "consent" is the product of coercion.

To hold otherwise would be to say that a confession, even though coerced, could be offered in evidence because the accused quickly succumbed to pressure. This would be to say that if "consent" to a warrantless search had been coerced or was the result of misrepresentation, the search would be valid if the householder did not protest at length, but acquiesced with alacrity and escorted the officers through the search. Indeed, that is exactly what happened in *Bumper v North Carolina,* supra.

The bog of conjecture which the Court of Appeals falls into by focusing not on the coercion, but on the supposed guilt, and the "cooperation" of Mizera, and the time it took for him to succumb, demonstrates the truth and the logic of *Bram v United States,* supra, that use of any form of coercion invalidates the "consent" and the law cannot measure the force of the influence used on the subject or decide its effect on his mind.

The trial court was of the opinion that *Schneckloth v Bustamonte,* supra, supports a rule that a "consent to cooperate in monitoring personal conversations, in effect a consent to searches, is not to be dissected with the scrutiny applicable to review of a confession or a guilty plea." Thus, although the trial court found that "a reference by one of the agents to the effect that an arrest would mean Mizera would be unable to meet an appointment with a doctor in New York . . . strain[ed] at . . . [Mizera's subjective] vulnerability in a manner which would cause great concern if this were a confession or waiver of a right associated with a fair trial."[3] Presumably, the trial

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[3]. The trial court did not apply the "totality of circumstances" test required by *Schneckloth v Bustamonte,* supra, but dissected the circumstances of coercion into bits and pieces and then tried to rationalize its holding by finding the insufficiency of each little bit and piece.

court considered that voluntary consent can be more coerced under the Fourth Amendment than it can under the Fifth.

Circuit Judges Hufstedler and Ely see no valid distinction between "voluntariness" as an issue under either the Fourth or Fifth Amendments. The dissent states:

> ". . . Coercion does not evaporate with an assumed change of climate between the Fourth and Fifth Amendments. Nor does coercion become free choice when it is applied to obtain consent rather than to force a confession."

The panel decision cites *Holmes v Burr,* 486 F2d 55 (9th Cir. 1973), to support its determination that the electronic surveillance was with the "consent" of Mizera. But *Holmes v Burr,* supra, did not involve any issue of coercion.[4]

There are no cases of this Court dealing with the issue of a coerced consent to participatory monitoring. Cases in which the product of such monitoring have been held admissible in evidence have been cases where the issue of coercion either did not exist or was not raised. On *Lee v United States,* (1952) 343 US 747; *Lopez v United States,* (1963) 373 US 427; and *United States v White,* (1971) 401 US 745.

The foregoing considerations show that every reason exists for this Court to grant the writ. The necessity for the writ to issue is also demonstrated by the "other side of the coin."

Suppose the panel decision of the Court of Appeals is allowed to stand as precedent that Government may bring coercive pressure against a subject to gain his "consent" under 18 U.S.C. 2511(2)(c). Then, let it be reflected that *Berger v New York,* (1967) 388 US 41, and *Katz v United States,* (1967) 389 US 347, are still the law of the land.

Let it be further reflected that 18 U.S.C. 2510-2520 is an

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4. In that case, Marburger paid an attorney $1000 on the attorney's misrepresentation that he had paid such sum as a fine to settle a liquor license violation charged against his client, Marburger. Marburger found out the truth and went himself, in the first instance, to see the liquor department authorities and had several conferences with them. Marburger agreed to make the phone calls to the attorney and to the monitoring, with no evidence of any official coercion.

elaborate enactment whereby Congress intended to bring the use of electronic eavesdropping as a police investigative device under the warrant requirements of the Fourth Amendment and under the control of an impartial judiciary.

Finally, let it be reflected that the only statutory exception to the warrant procedure is the instance where one of the parties to the communication has given prior consent to the eavesdropping.

Can it be that Congress intended that "consent" could lawfully be coerced from a man, thereby undoing the necessity for officers to resort to all the procedural safeguards so carefully and elaborately wrought in 18 U.S.C. 2510-2520?

Can it be that the standards of voluntariness of consent to a search of a house or automobile prohibit the use of police coercion, but standards of voluntariness of consent to electronic eavesdropping do not prohibit coercion?

Does the Fourth Amendment weigh more in one instance than another? Does the Fifth Amendment weigh more than the Fourth?

Surely, these are compelling constitutional inquiries of grave and national concern which require resolution by this Court.

2. Certiorari should be granted to dispell the uncertainty which exists regarding the application of the Travel Act.

Rewis v United States, (1971) 401 US 808 held that a gaming establishment conducted in violation of local law and which attracted customers to cross interstate lines, was not an activity within the scope of the Travel Act. No federal jurisdiction existed to support the prosecution and conviction of either (1) the patrons, or (2) the owners of the gaming establishment. *Rewis* rejected a government contention that the Travel Act should apply wherever the proprietors of the gaming establishment could foresee instances of interstate travel by patrons would occur.

Ever since *Rewis,* widespread uncertainty has existed on every level, among the accused, counsel, and the courts, as to whether a given local activity with incidence of interstate usage does or does not come under the Travel Act. If the interstate

usage is casual or incidental, the doctrine of *Rewis* would appear to foreclose federal jurisdiction, in view of the Congressional purpose to attack organized crime and to provide an aid to local authorities to combat criminal activity which is effected in-state from an out-of-state refuge.

The Court of Appeals in this case refused to apply the *Rewis* doctrine to the facts of this case.

In apparent eagerness to enlarge federal jurisdiction beyond the intention of Congress, the Court of Appeals, in this and other cases, avowedly gives the broadest possible construction which may be given to the Travel Act. *United States v Roselli*, 432 F2d 879 (9th Cir. 1970), a pre-*Rewis* case, and *United States v Colacurcio*, 499 F2d 1401 (9th Cir. 1974) a post-*Rewis* case.

The broad construction applied by the Ninth Circuit offends the principle that penal laws should be strictly construed against the Government. The broad construction offends the principle that crime is a matter for definition by the legislature — not the judiciary. The broad construction offends the principle that crimes should be defined with clarity and certainty. All of these principles are central to the due process of law and the doctrine of separation of powers.

The violation of these principles lays the foundation for an ad hoc administration of criminal justice, and that is what exists in the Ninth Circuit. The case of *United States v Colacurcio*, supra, specifies that the reach of 18 U.S.C. 1952 "rests with the courts to determine . . . in a case-by-case manner."

A case-by-case approach is appropriate when the court is called upon to determine the application of a principle of law to a given set of facts. Was a confession voluntary? Has the defendant been deprived of procedural due process? The answer may differ from case-to-case, depending on the facts, but the principle remains constant.

But a case-by-case approach is not appropriate to determine what conduct is constituted a crime by statute. The acts which constitute the crime must be legislatively defined — not left to an exercise of judicial discretion. The issue should be whether

the evidence shows that the accused committed the specific acts which constitute the crime.

The case-by-case approach simply substitutes a prospective judicial opinion for a legislative definition of a crime, and permits selective prosecution and conviction in that area of the law involving loss of liberty, where the constitutional necessity for a clear and certain definition of crime is most compelling.

Even under the case-by-case approach, however, the facts of this case demonstrate that the circumstance of Wilson's residence in California, and contact between Wilson, Mizera, and Zeldin in Nevada, was nothing more than a casual, trivial, incidental interstate connection.

Additionally, this is absolutely not a case where local authorities stood in any need of "aid to combat interstate criminal activity." Ryan was arrested by local authorities. He was investigated by a local grand jury which returned a "no bill." He was prosecuted under a criminal complaint, dismissed after a preliminary hearing for lack of probable cause. The circumstances of these investigations were widely publicized and known, including the activities of Mizera, Wilson and Zeldin. The Clark County District Attorney, the official then exclusively charged with authority to prosecute crimes by criminal information, did not apply for leave to file a direct information within the 15 days following Ryan's discharge for no probable cause. Thereafter, under the law of Nevada, any prosecution of Ryan was barred by the limitations statute.

The exercise of federal jurisdiction in this case is the clearest possible example of a desire to intrude federal rule into purely local matters beyond the intent of Congress and the scope of the Travel Act.

Apparently, the Court of Appeals misread the holding of *Rewis*. The panel opinion states that the Court of Appeals was "confronted with no parties comparable to the patrons of *Rewis*." The panel failed to recognize that the proprietors in *Rewis*, were also not subject to prosecution under the Travel Act.

The Court of Appeals has therefore rendered an opinion on a federal question which conflicts with the applicable decision of this Court.

The writ should be granted to review the case and declare whether the Travel Act applies to Ryan, and whether the Travel Act defines criminal contact under applicable constitutional standards.

The Court of Appeals protests that no decision has ever held the Travel Act was unconstitutional. This is mere evasion of the issue. The issue is whether the Travel Act is unconstitutional as applied to Ryan in this case. If so, then surely this Court, which stands as the highest guardian of the Constitution, would have the courage so to declare.

3. Certiorari should be granted to review the holding of the Court of Appeals that Ryan's failure to "rebuff" Mizera constituted Ryan a member of a conspiracy with Mizera, Wilson and Zeldin to bribe Ryan and other county commissioners, and that his membership in the conspiracy relieved the Government from proving that Ryan did anything to aid and abet substantive violations of the Travel Act.

The panel opinion expressed a novel standard of proof in cases where an indictment charges a defendant with a count of conspiring to violate the Travel Act, and a count of committing a substantive violation of the Travel Act as an aider and abetter. The opinion states:

> ". . . In a case where jurisdiction depends upon the interstate nature of the criminal activity, as with section [18 U.S.C.] 1952, section [18 U.S.C.] 2 considerably eases the prosecutor's burden. Because of [18 U.S.C.] section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme as a whole had substantial interstate connections. If it did, he must then prove that each defendant aided or abetted the scheme to make out his violation of [18 U.S.C.] section 1952 against each defendant. . . ."

No citation of authority is cited for this proposition.

The reasoning of the Court of Appeals appears to be referable to *Pinkerton v United States,* (1946) 328 US 640. In that case Pinkerton was indicted both for conspiring with his brother to evade taxes and for substantive tax evasions committed by the brother while Pinkerton was in jail. The trial

court gave a jury instruction that if Pinkerton was engaged in a conspiracy and the substantive offenses were in furtherance of the conspiracy, that the jury could convict Pinkerton of the substantive offense. In affirming Pinkerton's conviction, this court held that evidence of direct participation by Pinkerton in the commission of the substantive crimes was unnecessary. This Court admitted that a different result might have been reached if the crimes charged had not been reasonably forseeable as a natural consequence of the unlawful agreement.

The *Pinkerton* rule has not enjoyed broad reception in the federal courts because of the likelihood that double punishment may be imposed for the same criminal conduct, in violation of the Double Jeopardy Clause of the Fifth Amendment.[5]

In this case the trial court did not give a *Pinkerton* instruction. Nor does the panel opinion cite *Pinkerton* as authority for its conception of the reduced standard of proof which pertained to the Government in this case.

The conceptual difficulties with the *Pinkerton* doctrine are masterfully considered in the article often cited by this Court, *"Developments in the Law — Criminal Conspiracy,"* 72 Harvard Law Review 920, at pp. 993-1000.

The application of the *Pinkerton* rule to this case poses the initial stumbling block of whether Ryan (who did not know about or participate to any degree in the substantive acts of interstate travel and communication to any extent) could reasonably have foreseen that these acts would occur.

In *Pinkerton*, A and B conspired to evade taxes, and B did commit substantive tax evasions. In Ryan the conspiracy was to commit bribery, and interstate travel and communication was not an object of the conspiracy. While one who conspired to commit bribery might be liable as an accomplice to the commis-

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5. For example, in *United States v Schaefer,* 510 F2d 1307 (8th Cir. 1975), Cert Denied, 421 US 975, the court held that where the charge of conspiracy to conduct an illegal gambling business comprehended nothing more than the agreement which the defendants necessarily performed by the commission of the substantive offense itself, and there was no element in the conspiracy which was not present in the completed crime, the convictions on the conspiracy charge violated the double jeopardy clause.

sion of that bribery, how can he be liable as an accomplice to substantive acts of interstate travel and communication on no more evidence than that he conspired to commit bribery?

The key to all of this conceptual difficulty is that the substantive acts of interstate travel and communication are simply a peg on which to hang federal jurisdiction. There is, therefore, no basis in the contacts which Ryan had with Mizera before May 17th when Mizera became a state agent, which can rationally justify Ryan's liability as an accomplice.

Being perplexed to find any way to justify Ryan's convictions, the Court of Appeals held that the Government need only prove that Ryan aided a scheme with interstate connections, to establish him as a conspirator.

Being further perplexed to state how Ryan "aided the scheme" the Court of Appeals seized upon Ryan's passivity when he was offered a "political contribution" by Mizera, and Ryan's failure to "rebuff" Mizera's overtures, stating:

> "In analyzing Ryan's role in the conspiracy, it is important to keep in mind that Mizera had been rebuffed by all the other commissioners (except, of course, Broadbent, who was serving as an informant). Thus, without Ryan's cooperation with Mizera up to May 17th, the conspiracy almost certainly would have dissolved."

The result of the panel opinion is that:

(1) The Government has been relieved of its burden to prove acts of complicity to establish guilt of Ryan as an aider and abetter;

(2) Ryan has been subjected to double punishment in violation of the Double Jeopardy Clause; and

(3) Mere passivity to a criminal overture, and the failure to scotch the criminal, constitutes Ryan a criminal conspirator and an aider and abetter.

CONCLUSION

The issues raised by this petition are all grave constitutional problems, they are in the forefront of the work of the federal

judiciary, and should be resolved by review on a writ of certiorari herein.

Respectfully submitted:

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant.*	No. 75-1317
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ADRIAN WILSON, *Defendant-Appellant.*	No. 75-1314
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD ZELDIN, *Defendant-Appellant.*	No. 75-1313 OPINION

(May 24, 1976)

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT, KILKENNY and TRASK
Circuit Judges

TRASK, Circuit Judge:

Adrian Wilson, Bernard Zeldin and James Ryan appeal their convictions in Federal District Court for the District of Nevada for violation of 18 U.S.C. § 1952, the so-called "Travel Act," 18 U.S.C. §371, the federal conspiracy statute, and 18 U.S.C. §2, the aiding and abetting staute. They make several assign-

ments of error, relating to the jurisdiction of the court below, the legality of evidence gathered by wiretapping and electronic surveillance and the general conduct of the government in investigating and prosecuting this case. In connection with this last issue, appellants Zeldin and Wilson also argue that the government intentionally interfered with their attorney-client privilege. In addition, appellant Ryan alleges that the evidence was insufficient to support the verdict against him as a coconspirator, appellant Wilson argues that the trial judge erred in refusing certain jury instructions, and appellant Zeldin and Ryan challenge the constitutionality of the Travel Act. For the reasons set forth below, we affirm all appellants' convictions.

Each of the appellants filed an opening brief emphasizing facts as they apply to his particular case. Mindful of these individual variations we review the facts in their entirety, considering them in the light most favorable to the government, which is the appropriate standard for appellate review of judgments of conviction. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1971).

The case revolves around the attempt of appellant Wilson, a well-known architect and resident of Los Angeles, to have certain land he owned in Nevada approved for rezoning and acts of bribery committed to achieve this purpose. The rezoning decision was to be made by the Clark County Board of Commissioners. The central figure in this episode was one Miro Mizera, an unindicted coconspirator, a Czechoslovakian refugee in ill health and a licensed realtor in the Las Vegas area.

Mizera was interested in helping Wilson subdivide and sell his property. He visited Wilson in January 1972 in Los Angeles and told Wilson that rezoning could be accomplished only if a political contribution to the county commissioners were made. Mizera agreed to talk with Commissioner Ryan about this matter.

Mizera thereafter held a series of meetings with Ryan. At the first meeting, Ryan told Mizera that prospects for approval of the application were favorable. No discussion of a bribe or campaign contribution was made until the second meeting, when Mizera mentioned a $10,000 political contribution. After the Planning Commission, an advisory body, recommended rejecting

the rezoning plan, Ryan told Mizera that he (Mizera) would have to approach the other four commissioners himself.

Mizera was given an unenthusiastic reception by Commissioners Leavitt, Brennan, Wiesner and Broadbent, although all of them at least indicated to Mizera that the prospects for eventual approval of the plan were good. After meeting with Mizera on April 24, 1972, Broadbent telephoned the state Attorney General and informed him that he thought Mizera had offered a bribe in exchange for his vote. Broadbent then agreed to cooperate with state authorities by "playing along" with Mizera and recording all conversations with him.

The following day, the Board of Commissioners voted to continue consideration of the application until May, when Wilson could more conveniently be in Nevada. Shortly thereafter, Mizera contacted a Las Vegas attorney, Morris, to inquire about the possibility of representing Wilson at the hearing. Exactly what terms were discussed between Morris and Mizera is subject to dispute, but it appears that Morris was informed of the bribery scheme. In any event, a retainer agreement between Morris and Wilson was consummated. Mizera then told Broadbent that Morris would be representing Wilson in the forthcoming commission meeting and detailed the scheme as it then stood. This conversation was recorded.

On April 27, 1972, Broadbent, acting through an intermediary, Reeves, told Morris that he was being led into a trap and that he should get out of the affair altogether. Morris then withdrew from the retainer agreement, returning the fee Wilson had paid him. This contact between Broadbent, who was serving as a government informer, and Morris gives rise to one of the issues on appeal.

Mizera continued to meet with Broadbent and Ryan in May. His purpose at this time was to have one of them take control of the bribery plot and work to ensure the votes of the other commissioners. In particular, Mizera wanted one of them to make the motion for rezoning at the meeting. On May 16, 1972, Broadbent, at the behest of state agents, told Mizera that he had to back out of the deal and would not be able to support the zoning application. There was no further contact between Mizera and Broadbent until after the Commission meeting.

Mizera was also in contact with appellant Zeldin during this time. Zeldin was a local businessman who was to take charge of the development of Wilson's land after approval of the rezoning plan. Zeldin went to Los Angeles to confer with Wilson concerning the bribery scheme and to obtain the bribery money which Wilson had borrowed from a Los Angeles bank. This interstate trip formed part of the basis for the indictment under 18 U.S.C. § 1952, the Travel Act.

After Broadbent withdrew from the plot, Mizera telephoned Zeldin, who was in Los Angeles, and the two discussed the problem of which commissioner would make the motion for approval of the application. This interstate conversation also formed part of the section 1952 indictment. The following day, May 17, 1972, Mizera met with Ryan and at this time Ryan said that he would make the motion. Thereafter, Mizera again telephoned Zeldin in Los Angeles.

On May 19, 1972, Mizera was approached by state agents and informed of the evidence they had amassed against him through his conversations with Broadbent. The state agents offered Mizera immunity from prosecution in return for his assistance. From that point forward, Mizera was a state agent whose conversations were recorded. The tactics of the government in obtaining Mizera's cooperation give rise to another important issue in this appeal.

The bribery scheme was discussed and recorded in a conversation between Ryan and Mizera that very evening. Mizera also met with Wilson, who had flown in from Los Angeles on May 21st for the commissioners' meeting the following day, at which time the distribution of the bribery money among the commissioners was discussed. This conversation was also recorded.

The commissioners met on May 22nd. Commissioner Ryan made the motion, and the zoning application was approved. Mizera, Wilson and Zeldin then caucused in a motel room and Mizera was given the money to distribute to the commissioners. State agents monitored this entire meeting through a transmitting device Mizera carried on his person. The following day, Mizera went to Ryan's home and gave him the bribery money, which Ryan accepted. Immediately thereafter, state agents, who had been hiding in the trunk of Mizera's car, arrested Ryan.

I.

The first count of the indictment charged all appellants with conspiring to violate the Travel Act, 18 U.S.C. § 1952,[1] the second with violating the Travel Act and aiding and abetting therein, pursuant to 18 U.S.C. § 2.[2] In a case where jurisdiction depends upon the interstate nature of the criminal activity, as with section 1952, section 2 considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme as a whole had substantial interstate connections. If it did, he must then prove that each defendant aided or abetted the scheme to make out his violation of section 1952 against each defendant. It is for this reason that, in deciding the jurisdictional question, our primary focus is upon the scheme as a whole.

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[1] 18 U.S.C. § 1952 states:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are commited or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2] 18 U.S.C. § 2 states:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Appellants urge that the offenses committed here were matters of local concern; that there was no connection between the interstate travel and usage of interstate facilities and what they characterize as an "isolated local offense." Appellants argue that *Rewis v. United States*, 401 U.S. 808 (1971), is dispositive of the question of jurisdiction and mandates a finding that the acts committed in this case do not come within the ambit of section 1952. In that case, petitioners conducted an illegal lottery in Florida, just south of the Georgia-Florida state line. Although there was no evidence that petitioners themselves crossed state lines in connection with the lottery, several of the patrons of the lottery did so. On these facts, the Court held section 1952 inapplicable.

We do not find that *Rewis* supports appellants' position. We note specifically that the Court in *Rewis* cited with approval three lower court cases in which the organizers of an illegal scheme either traveled in interstate commerce or caused other organizers — as opposed to patrons — to do so.[3] These cases, Justice Marshall said, "correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." 401 U.S. at 813. We find the facts of these cases, all involving illegal gambling operations, much closer to our case than those of *Rewis* since we are confronted with no parties comparable to the patrons of *Rewis*.

This court reads the statute as broadly as *Rewis* will permit. In *United States v. Roselli*, 432 F.2d 879, 890-91 (9th Cir. 1970), a pre-*Rewis* case, we took a broad view of the act, rejecting a wide variety of challenges to its applicability which would have narrowed the act considerably. This broad construction was cited with approval in *United States v. Colacurcio*, 499 F.2d 1401, 1405-06 (9th Cir. 1974), a case decided well after *Rewis*.

Applying this general framework to appellants' case, we have no difficulty in concluding that this scheme comes well within the ambit of the statute. Mizera and Zeldin traveled in interstate commerce to discuss the rezoning with Wilson in California. Wilson gave Zeldin $10,000 to transport from California to

[3]United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62 (3rd Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

Nevada. Wilson traveled from California to Nevada to attend the county commissioners' hearing. Zeldin took part in at least two interstate telephone conversations with Mizera.[4]

II.

Evidence obtained by electronic surveillance and wiretapping in the investigation of this case can be divided into three types. First, state agents obtained evidence through wiretaps on the phone of Broadbent, the county commissioner who served as a government informant, as well as a "body tap" placed on Broadbent. A court order pursuant to state statute was obtained for the telephone tap but not the body tap. No party disputes that Broadbent's consent was obtained for both forms of electronic surveillance. Second, a wiretap order was issued pursuant to the same Nevada statute on May 4, 1972, permitting state agents to wire Mizera's residence and office, and to tap telephones in those places. Many conversations were recorded under this order between May 5th and May 19th, but only those involving Broadbent were offered at trial. Third, on May 19, 1972, Mizera agreed to cooperate with government authorities and also to allow his conversations, both telephone and personal, to be taped.

As to the first type of wiretap evidence, the law in this circuit is clear that one party's consent is sufficient justification for electronic surveillance and no prior judicial authorization is required. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973). Since no party disputes that Broadbent's consent was freely given, any evidence derived from this wiretap is free from challenge.

As to the second type, we note that none of these tapes (except those which also involved Broadbent) were introduced at trial. Pursuant to the command of *Alderman v. United States*,

[4]Appellants Zeldin and Ryan also argue that the Travel Act is unconstitutional as impermissibly vague or an infringement of the powers reserved to the states in the tenth amendment. Contentions of this nature have been consistently rejected both by this court and other circuits. United States v. Cozetti, 441 F.2d 344, 348 (9th Cir. 1971); United States v. Nichols, 421 F.2d 570, 571 (8th Cir 1970); Turf Center, Inc v. United States, 325 F.2d 793, 795-96 (9th Cir. 1963). By contrast, appellants have cited no cases holding the statute unconstitutional and we know of none.

394 U.S. 165 (1969), a hearing after the trial was nonetheless held to determine "the nature and relevance to (their) conviction of any conversations which may have been overheard," *Alderman, supra,* at 186. At this hearing, the district court ruled that the government had an independent source. Broadbent, for all information obtained by the wiretap on Mizera's phones during the period between May 5th and May 19th. The court also ruled that Mizera himself became an independent source of this same evidence after May 19th, when he agreed to cooperate with the authorities and told them all that had gone on prior to that time. No appellant was able to demonstrate to the court's satisfaction that evidence used at trial, or leads to evidence used at trial, were discovered as a result of these interceptions. Therefore, the court concluded that aside from the independent sources, "the information or leads obtained (from the Mizera wiretap before May 19th) were insignificant and insubstantial." After a thorough review of the evidence presented at this hearing and the arguments of counsel on behalf of their clients, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). We therefore affirm the trial court's conclusions.

Finally, we hold admissible on the basis of one party's consent evidence obtained from taps on Mizera's telephone and person after May 19th. *Holmes v. Burr, supra.* The question of Mizera's consent is discussed in more detail in Part III, *infra.*

III.

Appellants' arguments are also directed at the manner in which the government enlisted Mizera as a government informant. They claim that their due process rights have been violated by the government's treatment of Mizera. They would have us dismiss the indictment altogether on due process grounds, or, at the very least, exclude all evidence procured from the Mizera wiretap after May 19th.

Appellants rely particularly on Justice Rehnquist's statement in *United States v. Russell,* 411 U.S. 423, 431-32 (1973), that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" and argue that this is precisely that type of situation. Appellants' reliance upon this passage from *Russell* has two distinct bases.

Russell was directed specifically toward a consideration of the nature of the entrapment defense. Appellants faintly argue that Mizera forced them to commit criminal acts they would not otherwise have committed. This, of course, would be entrapment under the *Russell* standard. They argue more strenuously, however, that *Russell* considered entrapment from another perspective — the so-called "objective approach," where the focus is not on the "propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" *Russell, supra* at 441 (Stewart, J., dissenting). While the Court's opinion in *Russell* very clearly excludes use of the "objective approach" in most entrapment cases, the above-quoted passage of Justice Rehnquist for the Court does indicate that this approach may in certain limited instances be appropriate.

In examining the circumstances surrounding the government's confrontation with Mizera, in which he agreed to cooperate with government authorities, and Mizera's activities thereafter, we conclude that, measured against the *Russell* standard, the government's conduct did not rise to the level of a violation of appellants' due process rights. Government agents first read to Mizera the Nevada bribery statute, the "unlawful activity" which served as the predicate for the section 1952 indictment, and then recited some of the evidence they had amassed against him. Thereafter, it is undisputed that this "conversation" included the following factors:

1. Repeated assertions to Mizera that he *would* go to jail for 10 years if he refused to cooperate (10 years was the maximum sentence; the statute allows for 1-10 years imprisonment and no defendant was ultimately given the maximum).

2. Admonitions to Mizera not to get an attorney or his "usefulness" to state agents would be over.

3. Prophecies that his health would suffer irreparably if he went to jail.

4. Assurances that his friends, Wilson and Zeldin, would be kept "out of it."

5. Reminders that if he did not help obtain sufficient evidence against Ryan, he himself would be indicted.

This court does not condone the tactics used to gain Mizera's co-operation. We explicitly disagree with the lower court, which characterized the government's efforts as "excellent professional police work." On the basis of the applicable legal standards derived from *Russell,* however, we find that this treatment of Mizera does not violate appellants' due process rights. This court has emphasized that the due process channel which *Russell* kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice. *United States v. Lue,* 498 F.2d 531, 534 (9th Cir. 1974). The government's conduct, while not exemplary, does not rise to this level. See *Hampton v. United States,* 44 U.S.L.W. 4542, 4543-44 (April 27, 1976).

Nor does the government's treatment of Mizera and his acts as a government agent constitute entrapment in the "subjective," *Russell* sense. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play" *Russell* teaches, 411 U.S. at 436[5]. Here, the government enlisted Mizera's cooperation when the conspiracy was in a very advanced stage, just prior to its culmination on May 22nd. The conspiracy had been ongoing since at least January of that year.

Moreover, there is no evidence that Mizera's course of conduct changed in any sense after his enlistment on May 19th or that he influenced any of the appellants to change their course of conduct after he became a government agent. He continued to

[5]For this reason we reject Wilson's contention that the trial court's refusal to give entrapment instructions relating to Broadbent's contact with Wilson was reversible error. There is no indication that Wilson posed any objection to the trial court's refusal to give his proposed instructions and normally a failure to object will preclude appellate review. Fed. R. Crim. P. 30; 5A *Moore's Federal Practice* ¶51.04. Even if he had posed a timely objection, however, his proposed instructions would have presented to the jury statements of the law based upon an "objective standard" and therefore at odds with *Russell's* clear holding. They were thus properly rejected.

meet and discuss the bribery plan with Ryan. Wilson had previously made a commitment to come to Las Vegas on May 21st, and, as planned, Mizera met with him then, at which time the distribution of the bribery money was discussed. Zeldin was also present at this meeting, as planned. The argument that Mizera emplanted a criminal intent in unwilling participants at this late stage is transparently implausible.

For similar reasons, we are unpersuaded by appellants' argument that Mizera's decision to cooperate was coerced. Simply stated, Mizera had no practical alternative. Once the statute was read to him and he was confronted with the evidence the state held against him, Mizera was capable of determining that he faced an almost certain prison sentence. At that point, Mizera could have decided that cooperation with the authorities was in his self-interest and indeed his only hope of staying out of prison. While we would have preferred that the government had shown more restraint after confronting Mizera with the evidence against him, nothing said or done thereafter was likely to change his decision. We therefore hold that all wiretap and electronic surveillance evidence derived from Mizera's conversations after May 19th was properly admitted on the basis of one party's consent. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973).

Appellants Zeldin and Wilson raise an independent due process argument regarding the contact between Broadbent, who, it will be recalled, was also a government informant, and Morris, Wilson's retained attorney. It is undisputed that Broadbent approached Morris through an intermediary on April 27, 1972, and told Morris that he was being led into a trap, after which Morris withdrew from representing Wilson. Beyond this, however, the circumstances surrounding this contact are shrouded in mystery.

It is not clear, for example, on what basis Zeldin claims his due process rights were violated by Broadbent's contact. Morris testified at trial that he never met Zeldin prior to April 27, 1972. Zeldin claims at one point that he had agreed to enter into a partnership with Wilson, while at another point he states he *was* in partnership with Wilson at the time of this alleged interference. Nor do we know the terms of the Morris-Wilson retainer agreement — whether Wilson retained Morris for the alleged Wilson-Zeldin partnership, individually, or on some other basis.

In any event, all the evidence indicates that Broadbent was acting independently and out of concern for a long-time friend in urging Morris to remove himself from the case. There is absolutely no evidence that Broadbent consulted with state agents before approaching Morris or that the state was in any manner involved in this contact. While we do not hold that the government can always fall back on conventional agency principles to disclaim responsibility for acts committed by its informants, we do hold that on these unique facts no due process violation in the *Russell* sense transpired.

IV.

Appellant Ryan contends that the evidence was insufficient to support the verdict against him as a coconspirator. He argues that his participation in the conspiracy can only be proved by acts committed prior to May 19, 1972, the date Mizera became a state agent, on the theory that a person cannot conspire with himself and one who is acting as a government agent is incapable of being a member of a criminal conspiracy. Accepting, *arguendo*, the appropriateness of this principle in this case, we find the evidence more than sufficient to support the verdict.

Ryan met with Mizera on numerous occasions to discuss the rezoning. At the second of these meetings, in February of 1972, campaign contributions in exchange for a favorable vote were mentioned. Ryan did not repudiate the scheme at that time, as Broadbent had done upon first becoming aware of it. Rather, he continued to meet with Mizera concerning this rezoning. While the bribe was not specifically discussed in the March meeting, it is difficult to imagine that Ryan assumed that Mizera had dropped his original proposal. In April of 1972, Ryan did repudiate the plan altogether because his share of the "kitty" had been reduced, but resumed his role in the scheme shortly thereafter, when Mizera told him that he would receive $3,000 rather than the $2,000 originally promised. Finally, on May 17, 1972, Ryan told Mizera that he would make the necessary motion at the commission meeting.

In analyzing Ryan's role in the conspiracy, it is important to keep in mind that Mizera had been rebuffed by all the other commissioners (except, of course, Broadbent, who was serving as

an informant). Thus, without Ryan's cooperation with Mizera up to May 17th, the conspiracy almost certainly would have dissolved.

This court has repeatedly held that once a conspiracy is established, as it was here abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Turner,* 528 F.2d 143, 162 (9th Cir. 1975); *United States v. Westover,* 511 F.2nd 1154, 1157 (9th Cir. 1975). At the same time, we have said that mere knowledge of the existence of a conspiracy or mere association with a conspirator is insufficient to sustain a conviction. *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974). The government must show that a defendant had a "stake in the venture." *United States v. Cianchetti,* 315 F.2d 584, 588 (9th Cir. 1963). We find the evidence linking Ryan to this conspiracy considerably more than "slight" and clearly indicating a stake in the illegal venture.

Accordingly, for the reasons set forth herein, the judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant*	No. 75-1317
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ADRIAN WILSON, *Defendant-Appellant*	No. 75-1314
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD ZELDIN,* *Defendant-Appellant*	No. 75-1313

ORDER

Before: WRIGHT, KILKENNY and TRASK, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Trask have voted to reject the suggestion for a rehearing en banc. Judge Kilkenny recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and upon a request for en banc consideration by an active judge of the court and a vote thereon, the request for an en banc hearing was rejected by a majority of the active judges of the court. Fed. R. App. P. 35.

The opinion is modified by striking the first full paragraph on page 11 of the slip opinion and substituting therefor the paragraph attached hereto with new footnotes 6 and 7.

*No request for an en banc hearing was made by appellant Zeldin in No. 75-1313, and his petition for rehearing has heretofore been denied.

Likewise we are unpersuaded by appellants' argument that Mizera's decision to cooperate was coerced. Whether consent was voluntary or coerced is essentially a question of fact. *United States v. Page*, 302 F. 2d 81 (9th Cir. 1962). When presented with the problem, the District Court Judge wrote a thirteen page memorandum in which he dealt exclusively with the Mizera question. In resolving that issue as he did he pointed out that he not only had the testimony of Mizera clearly in mind but that he also had considered the two tape recordings of the meeting between Mizera and the agents when Mizera agreed to cooperate. The trial judge commented on those conversations at some length,[6] coming to the conclusion that Mizera voluntarily consented to cooperate.[7]

Footnote 6:

"When representatives of the Nevada Attorney General first approached Mizera on the morning of May 19, 1972, they told Mizera that they were there to ask for his cooperation, outlined their knowledge of his involvement in an ongoing criminal project of bribing County Commissioners, let Mizera read NRS § 197.020 (offering a bribe to a public official is a felony), assured Mizera that offering a 'campaign contribution' which is clearly conditioned upon a favorable vote on a zoning matter falls within that statute, indicated that they were more interested in discovering Commissioners who would accept bribes, stated that they were fully prepared to arrest Mizera at that point and that they had enough evidence to convict him and send him to prison for ten years, but offered Mizera the alternative of cooperation, in which event he could avoid prosecution, the penitentiary, and loss of his real estate broker's license. When Mizera asked if he might call an attorney, state officers responded that, because they feared that an attorney might notify the Commissioners of the investigation, and that because some attorneys might thereby compromise Mizera's position, they did not want him to contact an attorney. They quickly added that they were not saying he could not call an attorney, but were saying only that if he did, any offer of a deal was over. (It might be added parenthetically that testimony at the trial has indicated that intimations of the investigation were in fact given to some of the Commissioners by a local attorney, and that the agents' fears were not totally unfounded.) The agents outlined some of the disadvantages of an arrest and conviction, noting that Mizera would face ten years in prison, that it would have an impact on his family, that he would lose his license and his income derived therefrom, and stated that he would be unable to go back to New York for a

Requiring a defendant to face up to the real world in order to obtain his cooperation or to obtain admissions of guilt or a plea of guilty is permissible under our system. In *Brady v. United States,* 397 U. S. 742, 750, the Court said:

> "The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel

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Footnote 6 (Continued)

specialist's treatment of his headaches. The agents were candid about Mizera's position, stating that, in view of the alternatives, he was not in a position to bargain if he was to receive immunity. Once assured that he would be provided with protection from possible threats to his life because of his cooperation, Mizera agreed to cooperate. Mizera's decision was made in a matter of minutes from the time he was confronted. The tapes reflect the fact that the agents were direct but not vociferously overbearing.

. . . .

" . . . Mizera also testified that he was not fearful of a prison term, but he *subjectively* concluded that he would not get the medical care he felt he needed in prison. He stated that the agents never said that medicine would not be provided him if he refused to cooperate. Mizera, under cross-examination, indicated that he clearly understood the agents to say that, while he could call an attorney if he wished, it would mean that no deal would be offered him. While he stated he consented to cooperate with reluctance, Mizera nevertheless testified that he agreed to cooperate and went with the agents voluntarily.

"Finally, although the tape recordings made during the meetings of that day show that Mizera had occasional reluctant afterthoughts about cooperating, the major portions of the recordings reveal Mizera freely volunteering suggestions on how to proceed with the investigation."

Footnote 7

"Considering the circumstances as a whole, the tone, approach and statements of the agents, the rapidity with which Mizera consented, the active and willing cooperation Mizera demonstrated immediately after agreeing to assist the investigation, and Mizera's own testimony that he cooperated and voluntarily began that cooperation, this Court finds that Mizera's initial consent was 'voluntary' and valid."

> that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction."

See also Schneckloth v. Bustamonte, 412 U. S. 218 (1973); *Tollett v. Henderson,* 411 U. S. 258 (1973).

While we would have preferred that the government had shown more restraint after confronting Mizera with the evidence against him, we cannot say that the judgment of the trial court was clearly erroneous. We, therefore, hold that all wiretap and electronic surveillance evidence derived from Mizera's conversations after May 19 was properly admitted on the basis of one party's consent. *Holmes v. Burr,* 486 F. 2d 55 (9th Cir. 1973).

United States v. Ryan — No. 75-1317

HUFSTEDLER, Circuit Judge, dissenting from denial of en banc hearing, with whom Judge Ely joins:

The issue is whether Mizera's consent was voluntary. If Mizera's consent was involuntary, the conversations between him and Ryan were inadmissible under 18 U.S.C. § 2511(2)(c).[1]

The district court's factual findings on this issue can be summarized as follows:[3] To secure Mizera's consent, the officers

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[1] *E.g., see* Holmes v. Burr (9th Cir. 1973) 486 F. 2d 55; United States v. Franks (6th Cir. 1975) 511 F. 2d 25; United States v. Bragan (4th Cir. 1974, 499 F. 2d 1376.

[3] The district court's factual findings are, of course, subject to the clearly erroneous standard of review. However, the district court's ultimate conclusion that the consent was voluntary rests on a legal determination of the sufficiency of the evidence to support the conclusion. The standard of appellate review of this determination is the same as that applied in reviewing the sufficiency of evidence to sustain a conviction. (*E.g.,* Channel v. United States (9th Cir. 1960) 285 F. 2d 217, 220.)

Under either formulation of the standard of appellate review, the district court's conclusion of voluntariness is unsupported and is reversible error.

told him that they were prepared to arrest him immediately and that they had enough evidence to send him to prison for ten years. But, they suggested, if Mizera "cooperated," the prosecution would be dropped. The officers also told him that if he did not cooperate, he would lose his livelihood, damage his family, and be deprived of special medical treatments for his severe headaches. Mizera asked if he could call his lawyer. The officers said that he could do so, but if he did, the deal was off. The district court held that "consent" thus secured was "voluntary," the panel affirmed, and the court has refused to take this case en banc.

As early as 1897, the Supreme Court recognized that coercion need not take the form of physical torture:

> " 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of inflence has been exerted.' " (*Bram v. United States,* 168 U. S. 532, 542-43.)

And more recently:

> ". . . [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (*Schneckloth v. Bustamonte* (1973) 412 U. S. 218, 228.)

The psychological pressures employed by the officers in the present case represent just such coercion comprised of threats of prosecution and long imprisonment, of the inability to receive vital medical treatment, of unauthorized promises of immunity, and of the deprivation of counsel. The methods were

not as clumsy as physical torture, but they were no more subtle and every bit as effective.

The conclusion of the district court, affirmed by the panel, that this conduct was not coercive, and that the consent produced by these pressures was voluntary, is flatly contrary to the controlling teachings of the Supreme Court and to the law of our Circuit. (*E.g., Lynum v. Illinois* (1963) 372 U. S. 528 (Confession secured by threats that defendant " 'could get 10 years and [that] the children could be taken away' " unless she "cooperated," held involuntary.) 372 U.S. at 531, 534) "We think it is clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases." (372 U. S. at 534).) *Shotwell Mfg. Co. v. United States* (1963) 371 U. S. 341 (Evidence procured under promise of immunity "can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychological coercion." (371 U. S. at 347-48).) *Rogers v. Richmond* (1961) 365 U. S. 534 (Uncounseled confession of defendant who was threatened that his wife would be brought in for questioning was involuntary.) *See also, United States v. Huss* (2d Cir. 1973) 482 F. 2d 38; *United States v. Laughlin* (D. D.C. 1963) 222 F. Supp. 264; and *McGarrity v. Wilson* (9th Cir. 1966) 368 F. 2d 677, 679 ("Incriminating statements or a confession extorted by mental coercion are as involuntary as if they were obtained by violence or threats of violence.").)[3]

As Judge Duniway pointed out in *United States v. Rothman* (9th Cir. 1973) 492 F. 2d 1260, 1263: "Where the consent [to a search] is obtained through a misrepresentation by the government, Bumper v. North Carolina, *supra,* 391 U. S. 543 . . . , or under inherently coercive pressure and the color of

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[3] " 'The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' " (Bram v. United States (1897) 168 U. S. at 547.)

the badge, Johnson v. United States, *supra,* 333 U. S. 10; United States v. Marshall, 9 Cir. 1973, 488 F. 2d 1169, 1188-1189, such consent is not voluntary." Moreover, coercion is implied when consent is obtained "under color of the badge," and the Government must show that there was no coercion in fact. (*United States v. Irion* (9th Cir. 1973) 482 F. 2d 1240, 1244; *United States v. Page* (9th Cir. 1962) 302 F. 2d 81, 84.)

The district court attempted to justify its conclusion that Mizera's consent was voluntary by suggesting that "voluntariness" takes on a different meaning in the context of coerced confessions than it does in the context of consent to participation in monitoring or other activities protected by the Fourth Amendment. (Although the district court found that the threatened denial of medical treatment was not coercive in the present case, it said that it would have "great concern" if the case involved a confession or "the waiver of a right associated with a fair trial.") This distinction is unfounded. Coercion does not evaporate with an assumed change in climate between the Fourth and Fifth Amendments. Nor does coercion become free choice when it is applied to obtain consent rather than to force a confession. (*United States v. Rothman, supra,* 492 F. 2d 1260.)

The panel's effort to justify its conclusion is similarly unsuccessful. The panel postulates that the officers' threats did not induce Mizera's consent; rather, Mizera brought his plight upon himself. The officers, the panel says, simply required the defendant "to face up to the real world in order to obtain his cooperation;" that pressure is entirely appropriate, it adds, on analogy to pleas of guilty, quoting *Brady v. United States* (1969) 397 U. S. 742, 750.

The panel's assumption that Mizera was guilty of a crime is unsupported by the record. Mizera has not been convicted of any crime, except by the rhetoric of the officers and the speculations of the panel. The Constitution does not give law enforcement personnel the right to decide guilt or innocence, nor does it give courts the power to make that determination with neither a guilty plea nor a trial. But even if Mizera had been guilty of the crime for which the officers threatened prosecution and conviction, his guilt would be irrelevant in deciding

the coercion issue.[5] Coercion is not acceptable whether it is applied to persons who are ultimately found guilty or to those who are ultimately found innocent. Coercion is forbidden both because it is unacceptable police conduct in our justice system and because it tends to produce involuntary words and deeds. We should be ever mindful that "if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end." (*United States v. Huss* (2d Cir. 1973) 482 F. 2d 38, 52.)

No analogy exists between the taking of a guilty plea by a court and the extraction of "cooperation" or a confession by law enforcement officers, without the presence of any judicial officer and without the presence of counsel. As Mr. Justice White said in *Brady*: "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." (397 U. S. at 748.) "Since *Gideon v. Wainwright,* 372 U. S. 335 (1963), it has been clear that a guilty plea to a felony charge without counsel and without a waiver of counsel is invalid. [Citations omitted.]" (397 U. S. at 748-49, n.6.)

The officers effectively prevented Mizera from consulting counsel after he asked to do so. That deprivation cannot be brushed aside. His need for counsel was evident.[5] Counsel would

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[4] The panel relies on Holmes v. Burr, *supra,* where there was no question of coercion. It also uses United States v. Lue (9th Cir. 1974) 498 F. 2d 531, and Hampton v. United States (1976) — U.S. — [44 U.S.L.W. 4542] which are entrapment cases, holding that certain law enforcement techniques that take advantage of a subject's "predisposition" are not violative of due process. Here, the fact that extreme pressure had to be used to induce cooperation belies any notion that Mizera was predisposed to cooperate.

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[5] As Mr. Justice Sutherland observed in Powell v. Alabama (1932) 287 U. S. 45:

" . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is in-

surely have revealed to him that the officers' "compelling" statements were deceitful. The officers told Mizera that he would serve ten years, if convicted, knowing full well that ten years was the maximum penalty for Mizera's alleged misdeed. The officers also assured Mizera of conviction, although they had to know that conviction is not a certitude. Even worse, the officers offered to drop any charges against Mizera when they had no legal power to promise immunity. Consent obtained by governmental misrepresentation is involuntary. (*United States v. Rothman, supra,* 492 F. 2d at 1263; *see Fuller v. United States* (D.C. Cir. 1967) 407 F. 2d 1199, 1213 ("Of course garnering a confession by artifice is no more permissible than achieving the same result by some cruder coercion.").)

I would en banc this case to eradicate the intra-circuit conflict between *Ryan* and *United States v. Rothman, supra,* 492 F. 2d 1260, and its antecedents, and to bring *Ryan* in line with controlling Supreme Court authority. On the merits, I would reverse and remand *Ryan* for a new trial free from the tainted evidence.[9]

Shirley Hufstedler.

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capable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence . . . He requires the guiding hands of counsel at every step in the proceedings against him." (*Id.* at p.69.)

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9 It is noteworthy that the Government's respect for Mizera's constitutional rights has been deficient in more than one instance. The panel observes that Mizera's office and residence were "bugged" prior to his grant of consent on May 19, 1972. Nevertheless, because the evidence culled from this source was said to be available from independent sources, the panel rules that its admission did not constitute error. (United States v. Ryan, No. 75-1317, at p. 8 (slip op'n, May 24, 1976).)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant.*	No. 75-1317 DC #CR-LV 2698 RDF

ORDER STAYING ISSUANCE OF MANDATE

[Filed Dec. 9, 1976]

Upon application of Harry E. Claiborne, Esquire, counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before December 29, 1976.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Ozell M. Trask

United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA *Plaintiff,* vs. JAMES G. RYAN, ADRIAN WILSON and BERNARD ZELDIN, *Defendants.*	Criminal LV-2698

MEMORANDUM RE DEFENDANTS' MOTION TO STRIKE AND EXCLUDE EVIDENCE

[Entered Apr. 3, 1974]

During the trial of this case, the Court denied defendants' motion to strike and exclude evidence filed March 5, 1974, and responded to by the Government March 13, 1974. In denying the motion, the Court advised that it would subsequently file a memorandum.

Defendants James Ryan, Adrian Wilson and Bernard Zeldin moved to suppress all evidence regarding the activities of unindicted coconspirator Miro Mizera which followed Mizera's meeting with agents of the Nevada Attorney General on the morning of May 19, 1972. Counsel for defendants argued in support of this motion that the actions and statements of the representatives of the Nevada Attorney General, which took place when they confronted Mizera with their knowledge of his involvement in offering "campaign contributions" to Clark County Commissioners in exchange for favorable voting on a zoning variance application, were such that the Court's conscience should be shocked and that Mizera's consent to cooperate with the investigation into government corruption cannot be considered voluntary. A variety of legal considerations are woven into this argument. As discussed below, however, this Court found that the state agents did not violate traditional

notions of fundamental justice; rather, the agents exhibited a high degree of professionalism that, under the circumstances, does not offend the sensibilities of the Court or the tenets of civilized society. Further, this Court found that Mizera's consent to cooperate with officers of the Nevada Attorney General was "voluntary."

FACTS

The facts which give rise to this motion have been the subject of not only the testimony of Mizera, but were the subject of two tape recordings made by the agents when they met with Mizera and obtained his consent to cooperate. (Exhibits 24(a) and 46(b) for identification.) These tapes were submitted to the Court in camera for purposes of ruling on the instant motion, and they have proven most helpful in providing not only an accurate record of the exact conversations which took place, but also an indication of the tenor and tone of those conversations. A complete outline of these tapes will not be attempted here, but it is of note at the outset that only a very small portion of the conversations of May 19, 1972, pertain to Mizera's decision to cooperate with the investigation. Mizera made his decision rather quickly and the vast majority of the discussions thereafter held on May 19, 1972, deal with Mizera's active participation in formulating ways in which his cooperation would prove most effective in assisting the investigation.

When representatives of the Nevada Attorney General first approached Mizera on the morning of May 19, 1972, they told Mizera that they were there to ask for his cooperation, outlined their knowledge of his involvement in an ongoing criminal project of bribing County Commissioners, let Mizera read NRS § 197.020 (offering a bribe to a public official is a felony), assured Mizera that offering a "campaign contribution" which is clearly conditioned upon a favorable vote on a zoning matter falls within that statute, indicated that they were more interested in discovering Commissioners who would accept bribes, stated that they were fully prepared to arrest Mizera at that point and that they had enough evidence to convict him and send him to prison for ten years, but offered Mizera the alternative of cooperation, in which event he could avoid prosecution, the penitentiary, and loss of his real estate broker's license.

When Mizera asked if he might call an attorney, state officers responded that, because they feared that an attorney might notify the Commissioners of the investigation, and that because some attorneys might thereby compromise Mizera's position, they did not want him to contact an attorney. They quickly added that they were not saying he could not call an attorney, but were saying only that if he did, any offer of a deal was over. (It might be added parenthetically that testimony at the trial has indicated that intimations of the investigation were in fact given to some of the Commissioners by a local attorney, and that the agents' fears were not totally unfounded.) The agents outlined some of the disadvantages of an arrest and conviction, noting that Mizera would face ten years in prison, that it would have an impact on his family, that he would lose his license and his income derived therefrom, and stated that he would be unable to go back to New York for a specialist's treatment of his headaches. The agents were candid about Mizera's position, stating that, in view of the alternatives, he was not in a position to bargain if he was to receive immunity. Once assured that he would be provided with protection from possible threats to his life because of his cooperation, Mizera agreed to cooperate. Mizera's decision was made in a matter of minutes from the time he was confronted. The tapes reflect the fact that the agents were direct but not vociferously overbearing.

On the stand in the instant case, Mizera testified that he placed a condition upon his cooperation: that the Attorney General of Nevada not prosecute Adrian Wilson. Thus Mizera did bargain with the agents. Mizera also testified that he was not fearful of a prison term, but he *subjectively* concluded that he would not get the medical care he felt he needed in prison. He stated that the agents never said that medicine would not be provided him if he refused to cooperate. Mizera, under cross-examination, indicated that he clearly understood the agents to say that, while he could call an attorney if he wished, it would mean that no deal would be offered him. While he stated he consented to cooperate with reluctance, Mizera nevertheless testified that he agreed to cooperate and went with the agents voluntarily.

Finally, although the tape recordings made during the meetings of that day show that Mizera had occasional reluctant afterthoughts about cooperating, the major portions of the recordings reveal Mizera freely volunteering suggestions on how to proceed with the investigation.

ISSUES

1. Was the conduct of the state agents such that it shocks the conscience of the Court and requires that evidence resulting therefrom be excluded from this prosecution?

2. Was Mizera's consent to cooperate invalid so as to require exclusion of evidence obtained as a result of his agreeing thereafter to have his telephones and personal conversations monitored and recorded?

CONCLUSIONS

1. No.

2. No.

DISCUSSION

I.

Citing cases which deal with forced stomach pumping (Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952), deceptive voice identification procedures (Palmer v. Peyton, 359 F. 2d 199 (4th Cir. 1966)), informers paid contingent fees to provide evidence against named individuals as to crimes not yet committed (Williamson v. United States, 311 F. 2d 441 (5th Cir. 1962)), and dissenting opinions in an entrapment case (United States v. Russell, 411 U.S. 423, 436, 442, 93 S. Ct. 1637 (1973) (Douglas, J., dissenting; Stewart, J., dissenting)), counsel for defendants argue that the methods of persuasion utilized by state agents in the instant case likewise offend a sense of justice, and that their "brutalizing" conduct towards Mizera should shock the conscience of the Court. It is significant that defendants do not argue that any physical force was utilized, or that the agents misleadingly deceived and tricked Mizera, or that Mizera was offered a reward contingent upon producing evidence of as yet uncommitted crimes, or that Mizera was the innocent victim of a diabolical police entrapment, or that any of the defendants were the victims of

such an entrapment. Even assuming the cases cited by counsel are relevant, the actions of the officers in this case are not of the nature and quality that would support defendants' contention.

Notions of justice, fairness, personal dignity, and civilized society demand that police abstain from the use of investigative procedures which smack of physical or mental torture, falsification or creation of crime for the sake of punishment. The integrity of the judiciary and the acceptability of the ordered society in which we live require the courts to insure that the means utilized to investigate a case do not undermine the basic tenets of our system. But it makes mockery of this principle to *forbid* confrontation of an individual then and for some time past engaged in criminal activities in an effort to gain his cooperation in a legitimate investigation of an on-going criminal enterprise. In the instant case, the methods utilized in an effort to gain Mizera's cooperation were not of the "rubber hose" type, nor were they repugnant to civilized sensibilities. The officers were blunt, but they were not brutal. Mizera was not subjected to obnoxious or deplorable inducement. The officers were not seeking a confession, nor were they interested in falsifying evidence or creating crime where none existed. Mizera was presented with a decision that he made quickly, and his choice to cooperate facilitated his own freedom, a choice obviously in his own self interest. That he made the decision without the assistance of counsel does not offend substantive due process where it was clear that he could have called an attorney if he wished to forego cooperation and immunity. That he made the decision because of a subjective fear he would not receive medication was not a product of any lies on the part of the agents; it was his own conclusion and error. This Court is not shocked, nor can it condemn the agents' activities in such a way that exclusion of evidence obtained through Mizera's cooperation can be justified as a matter of sound policy.

II.

Counsel for the Government and for defendants correctly note that judicial decisions (see U. S. v. White, 401 U. S. 745, and Rathburn v. United States, 355 U. S. 107, 78 S. Ct. 161 (1957)) and 18 U.S.C. § 2510 et seq. require that a valid

prior consent by Mizera to the monitoring and recording of his telephone and personal conversations with the defendants must be shown before evidence obtained through such monitoring is admissible in the instant case. Defendants take the position that because Mizera's consent to cooperate, a consent inexorably linked to any subsequent agreements to allow monitoring, was the product of a promise of immunity, that consent was not "voluntary" and was therefore invalid. In this regard, defendants rely principally upon United States v. Laughlin, 222 F. Supp. 264 (D.D.C. 1963), motion to vacate denied 226 F. Supp. 112 (D.D.C. 1964), a case which directly supports this contention. However, Laughlin has been superseded by *United States v. Jones,* 433 F. 2d 1176 (D.C. Cir. 1970), cert. denied 402 U. S. 950, 91 St. Ct. 1613 (1971), and it is generally now recognized that a consent to such monitoring is *not* "involuntary" even though it was given under the pressure of a potential indictment or in return for a promise of immunity from prosecution. See *United States v. Osser,* 483 F. 2d 727, 730 (3rd. Cir. 1973); *United States v. Dowdy,* 479 F. 2d 213, 229 (4th Cir. 1973); *United States v. Silva,* 449 F. 2d 145, 146 (1st Cir. 1971), cert. denied 405 U. S. 918, 92 S. Ct. 942 (1972); *United States v. Jones,* supra; *Good v. United States,* 378 F. 2d 934, 936 (9th Cir. 1967). Threat of prosecution, at least in a case such as this where a prosecution would not be unfounded, and promise of immunity, do not render Mizera's consent "involuntary." At the same time, indicating the possible adverse effects on his family and his profession of a threatened prosecution would not alter this conclusion inasmuch as they would seem only part and parcel of any threat of prosecution. See *United States v. Jones,* supra (fear of indictment, loss of job, and foreclosure of home mortgage did not render a consent to cooperate invalid).

Mizera also testified that a promise of relocation, should his life be endangered, did not result in his deciding to consent. This factor would be analogous to a promise of immunity, even if it were significant, and would not, therefore, render the consent involuntary. Similarly, a promise not to prosecute Wilson would not seem to change the result where a promise of immunity to Mizera himself is not deemed sufficient to render the consent involuntary.

Two considerations of no small importance remain. However, before discussing these considerations an articulation of the applicable test for ascertaining the "voluntariness" of Mizera's consent is necessary. In *United States v. Silva,* supra, 449 F. 2d at 146, the Court stated:

> ". . . to establish involuntariness the defendant's burden is to show that [the consentor's] will was overcome by threats or improper inducement amounting to coercion or duress."

A similar test was enunciated under like circumstances in *United States v. Osser,* supra, 483 F. 2d at 730:

> "We can think of no time in which a party to a telephone conversation would permit the police to intercept that conversation when he, himself, would not seek something from the police in return, assuming he is of sound mind and knows the police are police. He might merely be seeking police protection . . . Or, indeed, he may be seeking leniency. However, so long as pressure is not initiated by the police for the purpose of overbearing the will of the party, this Court does not believe that the authorization given by the party is involuntary."

As noted previously, both of these cases found a consent "voluntary" where there had been inducements of promised leniency or threatened prosecution. How is one to ascertain whether, in a given case, the inducements presented by state agents render a consent involuntary? The Supreme Court recently addressed this issue in *Schneckloth v. Bustamonte,* 412 U. S. 218, 224-249, 93 S. Ct. 2041 (1973):

> "[The] cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen. 'The notion of "voluntariness," ' Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' Culombe v. Connecticut, 367 U. S. 568, 604-605. It cannot be taken literally to mean a 'knowing' choice. 'Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements — even those made under brutal treatment — are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.' It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'
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> "* * *
>
> "* * *

> "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U. S. 596; his lack of education, e.g., Payne v. Arkansas, 356 U. S. 560; or his low intelligence, e.g., Fikes v. Alabama, 352 U. S. 191; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U. S. 737; the length of detention . . . ; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U. S. 143; and the use of physical punishment such as the deprivation of food or sleep, e.g., Reck v. Pate, 367 U. S. 433. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Culombe v. Connecticut, supra, at 603.
>
> "The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances . . .
>
> "Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances . . .

" * * *

" * * *

"The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'

" * * *

"There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

" * * *

" * * *

"Nor can it even be said that a search, as opposed to an eventual trial, is somehow 'unfair' if a person consents to a search. While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct

a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant. And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. We have only recently stated: '[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.' Coolidge v. New Hampshire, 403 U. S., at 488. Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

" * * *

" * * *

"Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all of the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent . . . "

What emerges from *Schneckloth,* as pertains to the instant case, is that a consent to cooperation in monitoring personal conversations, in effect a consent to searches, is not to be dissected with the scrutiny applicable to review of a confession or a guilty plea. Rather, the trial court is to determine, in light of the total circumstances, whether the individual, as a factual matter, voluntarily consented or whether he consented because his will was overborne by duress or coercion.

In *Good v. United States,* supra, 378 F. 2d 936, the Ninth Circuit stressed that the presence of counsel at the time of consent provides strong support for finding that consent "voluntary." Absence of counsel, however, does not necessarily render the consent ineffective. See *McClure v. United States*, 332 F. 2d 19, 22 (9th Cir. 1964) (agents would ask for dismissal of pending indictment if individual would cooperate, no indication that an attorney was consulted, consent deemed voluntary). Mizera's consent in the instant case cannot be said to be unintelligent nor uninformed. Mizera, who had the option of contacting an attorney, could validly waive or forego counsel. This factor did not render the consent involuntary.

The remaining consideration is the factor most strenuously urged by defense counsel: Mizera's fears regarding his health. Yet, as indicated above, it was Mizera who subjectively concluded that a conviction and a prison term would mean his headache medications would be unavailable. The agents never stated such a result would occur. While this factor does bring out a subjective vulnerability of Mizera's, and a reference by one of the agents to the effect that an arrest would mean Mizera would be unable to meet an appointment with a doctor in New York does strain at this vulnerability in a manner which would cause great concern if this were a confession or waiver of a right associated with a fair trial, on balance in the instant circumstances this factor is not controlling. Mizera testified to a variety of subjective fears which entered his consideration of the offer to cooperate: fear of attacks by those involved with him in the zoning matter, fear of losing the large commission involved in the land deal, and fear of involving the man who owned the property. These fears were beyond the control of the agents, and reflect the fact that any time an individual engaged in illegal activity is confronted and asked to assist in an investigation, there will be many fears which a promise of immunity and protection will serve to alleviate. This is implicit in the circumstances which necessarily attend such a bargain.

Considering the circumstances as a whole, the tone, approach and statements of the agents, the rapidity with which Mizera consented, the active and willing cooperation Mizera demonstrated immediately after agreeing to assist the investigation, and Mizera's own testimony that he cooperated and voluntarily

began that cooperation, this Court finds that Mizera's initial consent was "voluntary" and valid.

DATED: April 3rd, 1974.

S/Roger D. Foley,
District Judge.

APPENDIX E

Revised: Nov. 30, 1976

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant.*	No. 75-1317
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ADRIAN WILSON, *Defendant-Appellant.*	No. 75-1314
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD ZELDIN, *Defendant-Appellant.*	No. 75-1313
	OPINION

[May 24, 1976]

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT, KILKENNY and TRASK, Circuit Judges.

TRASK, Circuit Judge:

Adrian Wilson, Bernard Zeldin and James Ryan appeal their convictions in Federal District Court for the District of Nevada for violation of 18 U.S.C. § 1952, the so-called "Travel Act," 18 U.S.C. § 371, the federal conspiracy statute, and 18 U.S.C.

§ 2, the aiding and abetting statute. They make several assignments of error, relating to the jurisdiction of the court below, the legality of evidence gathered by wiretapping and electronic surveillance and the general conduct of the government in investigating and prosecuting this case. In connection with this last issue, appellants Zeldin and Wilson also argue that the government intentionally interfered with their attorney-client privilege. In addition, appellant Ryan alleges that the evidence was insufficient to support the verdict against him as a coconspirator, appellant Wilson argues that the trial judge erred in refusing certain jury instructions, and appellants Zeldin and Ryan challenge the constitutionality of the Travel Act. For the reasons set forth below, we affirm all appellants' convictions.

Each of the appellants filed an opening brief emphasizing facts as they apply to his particular case. Mindful of these individual variations we review the facts in their entirety, considering them in the light most favorable to the government, which is the appropriate standard for appellate review of judgments of conviction. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Munns,* 457 F.2d 271 (9th Cir. 1971).

The case revolves around the attempt of appellant Wilson, a well-known architect and resident of Los Angeles, to have certain land he owned in Nevada approved for rezoning and acts of bribery committed to achieve this purpose. The rezoning decision was to be made by the Clark County Board of Commissioners. The central figure in this episode was one Miro Mizera, an unindicted coconspirator, a Czechoslovakian refugee in ill health and a licensed realtor in the Las Vegas area.

Mizera was interested in helping Wilson subdivide and sell his property. He visited Wilson in January 1972 in Los Angeles and told Wilson that rezoning could be accomplished only if a political contribution to the county commissioners were made. Mizera agreed to talk with Commissioner Ryan about this matter.

Mizera thereafter held a series of meetings with Ryan. At the first meeting, Ryan told Mizera that prospects for approval of the application were favorable. No discussion of a bribe or campaign contribution was made until the second meeting, when Mizera mentioned a $10,000 political contribution. After the Planning Commission, an advisory body, recommended rejecting

the rezoning plan, Ryan told Mizera that he (Mizera) would have to approach the other four commissioners himself.

Mizera was given an unenthusiastic reception by Commissioners Leavitt, Brennan, Wiesner and Broadbent, although all of them at least indicated to Mizera that the prospects for eventual approval of the plan were good. After meeting with Mizera on April 24, 1972, Broadbent telephoned the state Attorney General and informed him that he thought Mizera had offered a bribe in exchange for his vote. Broadbent then agreed to cooperate with state authorities by "playing along" with Mizera and recording all conversations with him.

The following day, the Board of Commissioners voted to continue consideration of the application until May, when Wilson could more conveniently be in Nevada. Shortly thereafter, Mizera contacted a Las Vegas attorney, Morris, to inquire about the possibility of representing Wilson at the hearing. Exactly what terms were discussed between Morris and Mizera is subject to dispute, but it appears that Morris was informed of the bribery scheme. In any event, a retainer agreement between Morris and Wilson was consummated. Mizera then told Broadbent that Morris would be representing Wilson in the forthcoming commission meeting and detailed the scheme as it then stood. This conversation was recorded.

On April 27, Broadbent, acting through an intermediary, Reeves, told Morris that he was being led into a trap and that he should get out of the affair altogether. Morris then withdrew from the retainer agreement, returning the fee Wilson had paid him. This contact between Broadbent, who was serving as a government informer, and Morris gives rise to one of the issues on appeal.

Mizera continued to meet with Broadbent and Ryan in May. His purpose at this time was to have one of them take control of the bribery plot and work to ensure the votes of the other commissioners. In particular, Mizera wanted one of them to make the motion for rezoning at the meeting. On May 16, 1972, Broadbent, at the behest of state agents, told Mizera that he had to back out of the deal and would not be able to support the zoning application. There was no further contact between Mizera and Broadbent until after the Commission meeting.

Mizera was also in contact with appellant Zeldin during this time. Zeldin was a local businessman who was to take charge of the development of Wilson's land after approval of the rezoning plan. Zeldin went to Los Angeles to confer with Wilson concerning the bribery scheme and to obtain the bribery money which Wilson had borrowed from a Los Angeles bank. This interstate trip formed part of the basis for the indictment under 18 U.S.C. § 1952, the Travel Act.

After Broadbent withdrew from the plot, Mizera telephoned Zeldin, who was in Los Angeles, and the two discussed the problem of which commissioner would make the motion for approval of the application. This interstate conversation also formed part of the section 1952 indictment. The following day, May 17, 1972, Mizera met with Ryan and at this time Ryan said that he would make the motion. Thereafter, Mizera again telephoned Zeldin in Los Angeles.

On May 19, 1972, Mizera was approached by state agents and informed of the evidence they had amassed against him through his conversations with Broadbent. The state agents offered Mizera immunity from prosecution in return for his assistance. From that point forward, Mizera was a state agent whose conversations were recorded. The tactics of the government in obtaining Mizera's cooperation gave rise to another important issue in this appeal.

The bribery scheme was discussed and recorded in a conversation between Ryan and Mizera that very evening. Mizera also met with Wilson, who had flown in from Los Angeles on May 21st for the commissioners' meeting the following day, at which time the distribution of the bribery money among the commissioners was discussed. This conversation was also recorded.

The commissioners met on May 22nd. Commissioner Ryan made the motion, and the zoning application was approved. Mizera, Wilson and Zeldin then caucused in a motel room and Mizera was given the money to distribute to the commissioners. State agents monitored this entire meeting through a transmitting device Mizera carried on his person. The following day, Mizera went to Ryan's home and gave him the bribery money, which Ryan accepted. Immediately thereafter, state agents, who had been hiding in the trunk of Mizera's car, arrested Ryan.

I.

The first count of the indictment charged all appellants with conspiring to violate the Travel Act, 18 U.S.C. § 1952,[1] the second with violating the Travel Act and aiding and abetting therein, pursuant to 18 U.S.C. § 2.[2] In a case where jurisdiction depends upon the interstate nature of the criminal activity, as with section 1952, section 2 considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme as a whole had substantial interstate connections. If it did, he must then prove that each defendant aided or abetted the scheme to make out his violation of section 1952 against each defendant. It is for this reason that, in deciding the jurisdictional question, our primary focus is upon the scheme as a whole.

---

[1]18 U.S.C. § 1952 states:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interestate or foreign commerce, including the mail, with intent to —

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the Laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2]18 U.S.C. § 2 states:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Appellants urge that the offenses committed here were matters of local concern; that there was no connection between the interstate travel and usage of interstate facilities and what they characterize as an "isolated local offense." Appellants argue that *Rewis v. United States*, 401 U.S. 808 (1971), is dispositive of the question of jurisdiction and mandates a finding that the acts committed in this case do not come within the ambit of section 1952. In that case, petitioners conducted an illegal lottery in Florida, just south of the Georgia-Florida state line. Although there was no evidence that petitioners themselves crossed state lines in connection with the lottery, several of the patrons of the lottery did so. On these facts, the Court held section 1952 inapplicable.

We do not find that *Rewis* supports appellants' position. We note specifically that the Court in *Rewis* cited with approval three lower court cases in which the organizers of an illegal scheme either traveled in interstate commerce or caused other organizers — as opposed to patrons — to do so.[3] These cases, Justice Marshall said, "correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." 401 U.S. at 813. We find the facts of these cases, all involving illegal gambling operations, much closer to our case than those of *Rewis,* since we are confronted with no parties comparable to the patrons of *Rewis.*

This court reads the statute as broadly as *Rewis* will permit. In *United States v. Roselli,* 432 F.2d 879, 890-91 (9th Cir. 1970), a pre-*Rewis* case, we took a broad view of the act, rejecting a wide variety of challenges to its applicability which would have narrowed the act considerably. This broad construction was cited with approval in United *States v. Colacurcio*, 499 F.2d 1401, 1405-06 (9th Cir. 1974) a case decided well after *Rewis.*

Applying this general framework to appellants' case, we have no difficulty in concluding that this scheme comes well within the ambit of the statute. Mizera and Zeldin traveled in interstate commerce to discuss the rezoning with Wilson in California.

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[3]United States vs. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

Wilson gave Zeldin $10,000 to transport from California to Nevada. Wilson traveled from California to Nevada to attend the county commissioners' hearing. Zeldin took part in at least two interstate telephone conversations with Mizera.[4]

II.

Evidence obtained by electronic surveillance and wiretapping in the investigation of this case can be devided into three types. First, state agents obtained evidence through wiretaps on the phone of Broadbent, the county commissioner who served as a government informant, as well as a "body tap" placed on Broadbent. A court order pursuant to state statute was obtained for the telephone tap but not the body tap. No party disputes that Broadbent's consent was obtained for both forms of electronic surveillance. Second, a wiretap order was issued pursuant to the same Nevada statute on May 4, 1972, permitting state agents to wire Mizera's residence and office, and to tap telephones in those places. Many conversations were recorded under this order between May 5th and May 19th, but only those involving Broadbent were offered at trial. Third, on May 19, 1972, Mizera agreed to cooperate with government authorities and also agreed to allow his conversations, both telephone and personal, to be taped.

As to the first type of wiretap evidence, the law in this circuit is clear that one party's consent is sufficient justification for electronic surveillance and no prior judicial authorization is required. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973). Since no party disputes that Broadbent's consent was freely given, any evidence derived from the wiretap is free from challenge.

As to the second type, we note that none of these tapes (except those which also involved Broadbent) were introduced at trial. Pursuant to the command of *Alderman v. United States,*

[4]Appellants Zeldin and Ryan also argue that the Travel Act is unconstitutional as impermissibly vague or an infringement of the powers reserved to the states in the tenth amendment. Contentions of this nature have been consistently rejected both by this court and other circuits. United States v. Cozetti, 441 F.2d 344, 348 (9th Cir. 1971); United States v. Nichols, 421 F.2d 570, 574 (8th Cir. 1970); Turf Center, Inc. v. United States, 325 F.2d 793, 795-96 (9th Cir. 1963). By contrast, appellants have cited no cases holding the statute unconstitutional and we know of none.

394 U.S. 165 (1969), a hearing after the trial was nonetheless held to determine "the nature and relevance to [their] conviction of any conversations which may have been overheard," *Alderman, supra,* at 186. At this hearing, the district court ruled that the government had an independent source, Broadbent, for all information obtained by the wiretap on Mizera's phones during the period between May 5th and May 19th. The court also ruled that Mizera himself became an independent source of this same evidence after May 19th, when he agreed to cooperate with the authorities and told them all that had gone on prior to that time. No appellant was able to demonstrate to the court's satisfaction that evidence used at trial, or leads to evidence used at trial, were discovered as a result of these interceptions. Therefore, the court concluded that aside from the independent sources, "the information or leads obtained [from the Mizera wiretap before May 19th] were insignificant and insubstantial." After a thorough review of the evidence presented at this hearing and the arguments of counsel on behalf of their clients, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). We therefore affirm the trial court's conclusions.

Finally, we hold admissible on the basis of one party's consent evidence obtained from taps on Mizera's telephone and person after May 19th. *Holmes v. Burr, supra.* The question of Mizera's consent is discussed in more detail in Part III, *infra.*

III.

Appellants' arguments are also directed at the manner in which the government enlisted Mizera as a government informant. They claim that their due process rights have been violated by the government's treatment of Mizera. They would have us dismiss the indictment altogether on due process grounds, or, at the very least, exclude all evidence procured from the Mizera wiretap after May 19th.

Appellants rely particularly on Justice Rehnquist's statement in *United States v. Russell,* 411 U.S. 423, 431-32 (1973), that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" and argue that this is precisely that type of situation. Appellants' reliance upon this passage from *Russell* has two distinct bases.

Russell was directed specifically toward a consideration of the nature of the entrapment defense. Appellants faintly argue that Mizera forced them to commit criminal acts they would not otherwise have committed. This, of course, would be entrapment under the *Russell* standard. They argue more strenuously, however, that *Russell* considered entrapment from another perspective — the so-called "objective approach," where the focus is not on the "propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' " *Russell*, *supra* at 441 (Stewart, J., dissenting). While the Court's opinion in *Russell* very clearly excludes use of the "objective approach" in most entrapment cases, the above-quoted passage of Justice Rehnquist for the Court does indicate that this approach may in certain limited instances be appropriate.

In examining the circumstances surrounding the government's confrontation with Mizera, in which he agreed to cooperate with government authorities, and Mizera's activities thereafter, we conclude that, measured against the *Russell* standard, the government's conduct did not rise to the level of a violation of appellants' due process rights. Government agents first read to Mizera the Nevada bribery statute, the "unlawful activity" which served as the predicate for the section 1952 indictment, and then recited some of the evidence they had amassed against him. Thereafter, it is undisputed that this "conversation" included the following factors:

1. Repeated assertions to Mizera that he *would* go to jail for 10 years if he refused to cooperate (10 years was the maximum sentence; the statute allows for 1-10 years imprisonment and no defendant was ultimately given the maximum).

2. Admonitions to Mizera not to get an attorney or his "usefulness" to state agents would be over.

3. Prophecies that his health would suffer irreparably if he went to jail.

4. Assurances that his friends, Wilson and Zeldin, would be kept "out of it."

5. Reminders that if he did not help obtain sufficient evidence against Ryan, he himself would be indicted.

This court does not condone the tactics used to gain Mizera's co-operation. We explicitly disagree with the lower court, which characterized the government's efforts as "excellent professional police work." On the basis of the applicable legal standards derived from *Russell,* however, we find that this treatment of Mizera does not violate appellants' due process rights. This court has emphasized that the due process channel which *Russell* kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice. *United States v. Lue,* 498 F.2d 531, 534 (9th Cir. 1974). The government's conduct, while not exemplary, does not rise to this level. *See Hampton v. United States,* 44 U.S. L.W. 4542, 4543-44 (April 27, 1976).

Nor does the government's treatment of Mizera and his acts as a government agent constitute entrapment in the "subjective," *Russell* sense. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes in to play" *Russell* teaches, 411 U.S. at 436.[5] Here, the government enlisted Mizera's cooperation when the conspiracy was in a very advanced stage, just prior to its culmination on May 22nd. The conspiracy had been ongoing since at least January of that year.

Moreover, there is no evidence that Mizera's course of conduct changed in any sense after his enlistment on May 19th or that he influenced any of the appellants to change their course of conduct after he became a government agent. He continued to

[5]For this reason we reject Wilson's contention that the trial court's refusal to give entrapment instructions relating to Broadbent's contact with Wilson was reversible error. There is no indication that Wilson posed any objection to the trial court's refusal to give his proposed instructions and normally a failure to object will preclude appellate review. Fed. R. Crim. P. 30; 5A *Moore's Federal Practice.* ¶ 51.04. Even if he had posed a timely objection, however, his proposed instructions would have presented to the jury statements of the law based upon an "objective standard" and therefore at odds with *Russell's* clear holding. They were thus properly rejected.

meet and discuss the bribery plan with Ryan. Wilson had previously made a commitment to come to Las Vegas on May 21st, and, as planned, Mizera met with him then, at which time the distribution of the bribery money was discussed. Zeldin was also present at this meeting, as planned. The argument that Mizera emplanted a criminal intent in unwilling participants at this late stage is transparently implausible.

Likewise we are unpersuaded by appellants' argument that Mizera's decision to cooperate was coerced. Whether consent was voluntary or coerced is essentially a question of fact. *United States v. Page,* 302 F.2d 81 (9th Cir. 1962). When presented with the problem, the District Court Judge wrote a thirteen page memorandum in which he dealt exclusively with the Mizera question. In resolving that issue as he did he pointed out that he not only had the testimony of Mizera clearly in mind but that he also had considered the two tape recordings of the meeting between Mizera and the agents when Mizera agreed to cooperate. The trial judge commented on those conversations at some length,[6] coming to the conclusion that Mizera voluntarily

[6]"When representatives of the Nevada Attorney General first approached Mizera on the morning of May 19, 1972, they told Mizera that they were there to ask for his cooperation, outlined their knowledge of his involvement in an ongoing criminal project of bribing County Commissioners, let Mizera read NRS § 197.020 (offering a bribe to a public official is a felony), assured Mizera that offering a 'campaign contribution' which is clearly conditioned upon a favorable vote on a zoning matter falls within that statute, indicated that they were more interested in discovering Commissioners who would accept bribes, stated that they were fully prepared to arrest Mizera at that point and that they had enough evidence to convict him and send him to prison for ten years, but offered Mizera the alternative of cooperation, in which event he could avoid prosecution, the penitentiary, and loss of his real estate broker's license. When Mizera asked if he might call an attorney, state officers responded that, because they feared that an attorney might notify the Commissioners of the investigation, and that because some attorneys might thereby compromise Mizera's position, they did not want him to contact an attorney. They quickly added that they were not saying he could not call an attorney, but were saying only that if he did, any offer of a deal was over. (It might be added parenthetically that testimony at the trial has indicated that intimations of the investigation were in fact given to some of the Commissioners by a local attorney, and that the agents' fears were not totally unfounded.) The agents

consented to cooperate.[7]

Requiring a defendant to face up to the real world in order to obtain his cooperation or to obtain admissions of guilt or a plea of guilty is permissible under our system. In *Brady v. United States,* 397 U.S. 742, 750, the Court said:

> "The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For

outlined some of the disadvantages of an arrest and conviction, noting that Mizera would face ten years in prison, that it would have an impact on his family, that he would lose his license and his income derived therefrom, and stated that he would be unable to go back to New York for a specialist's treatment of his headaches. The agents were candid about Mizera's position, stating that, in view of the alternatives, he was not in a position to bargain if he was to receive immunity. Once assured that he would be provided with protection from possible threats to his life because of his cooperation, Mizera agreed to cooperate. Mizera's decision was made in a matter of minutes from the time he was confronted. The tapes reflect the fact that the agents were direct but not vociferously overbearing.

. . . .

". . . Mizera also testified that he was not fearful of a prison term, but he *subjectively* concluded that he would not get the medical care he felt he needed in prison. He stated that the agents never said that medicine would not be provided him if he refused to cooperate. Mizera, under cross-examination, indicated that he clearly understood the agents to say that, while he could call an attorney if he wished, it would mean that no deal would be offered him. While he stated he consented to cooperate with reluctance, Mizera nevertheless testified that he agreed to cooperate and went with the agents voluntarily.

"Finally, although the tape recordings made during the meetings of that day show that Mizera had occasional reluctant afterthoughts about cooperating, the major portions of the recordings reveal Mizera freely volunteering suggestions on how to proceed with the investigation."

[7]"Considering the circumstances as a whole, the tone, approach and statements of the agents, the rapidity with which Mizera consented, the active and willing cooperation Mizera demonstrated immediately after agreeing to assist the investigation, and Mizera's own testimony that he cooperated and voluntarily began that cooperation, this Court finds that Mizera's initial consent was 'voluntary' and valid."

> others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction."

See also Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *Tollett v. Henderson,* 411 U.S. 258 (1973).

While we would have preferred that the government had shown more restraint after confronting Mizera with the evidence against him, we cannot say that the judgment of the trial court was clearly erroneous. We, therefore, hold that all wiretap and electronic surveillance evidence derived from Mizera's conversations after May 19 was properly admitted on the basis of one party's consent. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973).

Appellants Zeldin and Wilson raise an independent due process argument regarding the contact between Broadbent, who, it will be recalled, was also a government informant, and Morris, Wilson's retained attorney. It is undisputed that Broadbent approached Morris through an intermediary on April 27, 1972, and told Morris that he was being led into a trap, after which Morris withdrew from representing Wilson. Beyond this, however, the circumstances surrounding this contact are shrouded in mystery.

It is not clear, for example, on what basis Zeldin claims his due process rights were violated by Broadbent's contact. Morris testified at trial that he never met Zeldin prior to April 27, 1972. Zeldin claims at one point that he had agreed to enter into a partnership with Wilson, while at another point he states he *was* in partnership with Wilson at the time of this alleged interference. Nor do we know the terms of the Morris-Wilson retainer agreement — whether Wilson retained Morris for the alleged Wilson-Zeldin partnership, individually, or on some other basis.

In any event, all the evidence indicates that Broadbent was acting independently and out of concern for a long-time friend in urging Morris to remove himself from the case. There is absolutely no evidence that Broadbent consulted with state agents before approaching Morris or that the state was in any manner involved in this contract. While we do not hold that the government can always fall back on conventional agency principles to disclaim responsibility for acts committed by its informants, we do hold that on these unique facts no due process violation in the *Russell* sense transpired.

IV.

Appellant Ryan contends that the evidence was insufficient to support the verdict against him as a coconspirator. He argues that his participation in the conspiracy can only be proved by acts committed prior to May 19, 1972, the date Mizera became a state agent, on the theory that a person cannot conspire with himself and one who is acting as a government agent is incapable of being a member of a criminal conspiracy. Accepting, *arguendo,* the appropriateness of this principle in this case, we find the evidence more than sufficient to support the verdict.

Ryan met with Mizera on numerous occasions to discuss the rezoning. At the second of these meetings, in February of 1972, campaign contributions in exchange for a favorable vote were mentioned. Ryan did not repudiate the scheme at that time, as Broadbent had done upon first becoming aware of it. Rather, he continued to meet with Mizera concerning this rezoning. While the bribe was not specifically discussed in the March meeting, it is difficult to imagine that Ryan assumed that Mizera had dropped his original proposal. In April of 1972, Ryan did repudiate the plan altogether because his share of the "kitty" had been reduced, but resumed his role in the scheme shortly thereafter, when Mizera told him that he would receive $3,000 rather than the $2,000 originally promised. Finally, on May 17, 1972, Ryan told Mizera that he would make the necessary motion at the commission meeting.

In analyzing Ryan's role in the conspiracy, it is important to keep in mind that Mizera had been rebuffed by all the other commissioners (except, of course, Broadbent, who was serving as an informant). Thus, without Ryan's cooperation with Mizera

up to May 17th, the conspiracy almost certainly would have dissolved.

This court has repeatedly held that once a conspiracy is established, as it was here abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Turner,* 528 F.2d 143, 162 (9th Cir. 1975); *United States v. Westover,* 511 F.2d 1154, 1157 (9th Cir. 1975). At the same time, we have said that mere knowledge of the existence of a conspiracy or mere association with a conspirator is insufficient to sustain a conviction. *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974). The government must show that a defendant had a "stake in the venture." *United States v. Cianchetti,* 315 F.2d 584, 588 (2d Cir. 1963). We find the evidence linking Ryan to this conspiracy considerably more than "slight" and clearly indicating a stake in the illegal venture.

Accordingly, for the reasons set forth herein, the judgment of the district court is

Affirmed.

A request for en banc consideration having been made by an active member of the court, and the matter submitted to all of the active judges, the request was rejected by a majority thereof. An order was thereupon entered denying en banc consideration. Judge Hufstedler files the following dissent from that order, in which Judge Ely joins.

HUFSTEDLER, Circuit Judge, dissenting from denial of en banc hearing with whom Judge Ely joins:

The issue is whether Mizera's consent was voluntary. If Mizera's consent was involuntary, the conversations between him and Ryan were inadmissible under 18 U.S.C. § 2511(2)(c).[1]

The district court's factual findings on this issue can be summarized as follows:[2] To secure Mizera's consent, the officers told

[1]E.g., *see* Holmes v. Burr (9th Cir. 1973) 486 F.2d 55; United States v. Franks (6th Cir. 1975) 511 F.2d 25; United States v. Bragan (4th Cir. 1974) 499 F.2d 1376.

[2]The district court's factual findings are, of course, subject to the clearly erroneous standard of review. However, the district court's ultimate conclusion that the consent was voluntary rests on a legal determination of the sufficiency of the evidence to support the conclusion. The standard of appellate review of this determination is the same as that applied in reviewing the sufficiency of evidence to sustain a conviction. (E.g., Channel v. United States (9th Cir. 1960) 285 F.2d 217, 220.)

Under either formulation of the standard of appellate review, the district court's conclusion of voluntariness is unsupported and is reversible error.

him that they were prepared to arrest him immediately and that they had enough evidence to send him to prison for ten years. But, they suggested, if Mizera "cooperated," the prosecution would be dropped. The officers also told him that if he did not cooperate, he would lose his livelihood, damage his family, and be deprived of special medical treatments for his severe headaches. Mizera asked if he could call his lawyer. The officers said that he could do so, but if he did, the deal was off. The district court held that "consent" thus secured was "voluntary," the panel affirmed, and the court has refused to take this case en banc.

As early as 1897, the Supreme Court recognized that coercion need not take the form of physical torture:

> "'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'" (*Bram v. United States*, 168 U.S. 532, 542-43.)

And more recently:

> ". . . [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228.)

The psychological pressures employed by the officers in the present case represent just such coercion comprised of threats of prosecution and long imprisonment, of the inability to receive vital medical treatment, of unauthorized promises of immunity, and of the deprivation of counsel. The methods were not as clumsy as physical torture, but they were no more subtle and every bit as effective.

The conclusion of the district court, affirmed by the panel, that this conduct was not coercive, and that the consent produced by these pressures was voluntary, is flatly contrary to the controlling teachings of the Supreme Court and to the law of our Circuit. (*E.g., Lynum v. Illinois* (1963) 372 U.S. 528 (Confession secured by threats that defendant " 'could get 10 years and [that] the children could be taken away' " unless she "cooperated," held involuntary. (372 U.S. at 531, 534) "We think it is clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases." (372 U.S. at 534).) *Shotwell Mfg. Co. v. United States* (1963) 371 U.S. 341. (Evidence procured under promise of immunity "can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychological coercion." (371 U.S. at 347-48).) *Rogers v. Richmond* (1961) 365 U.S. 534 (Uncounseled confession of defendant who was threatened that his wife would be brought in for questioning was involuntary.) *See also, United States v. Huss* (2d Cir. 1973) 482 F.2d 38; *United States v. Laughlin* (D. D.C. 1963) 222 F. Supp. 264; and *McGarrity v. Wilson* (9th Cir. 1966) 368 F.2d 677, 679 ("Incriminating statements or a confession extorted by mental coercion are as involuntary as if they were obtained by violence or threats of violence.").)[3]

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[3]" 'The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' " (Bram v. United States (1897) 168 U.S. at 547.)

As Judge Duniway pointed out in *United States v. Rothman* (9th Cir. 1973) 492 F.2d 1260, 1263: "Where the consent [to a search] is obtained through a misrepresentation by the government, Bumper v. North Carolina, *supra,* 391 U.S. 543 . . ., or under inherently coercive pressure and the color of the badge, Johnson v. United States, *supra,* 333 U.S. 10; United States v. Marshall, 9 Cir. 1973, 488 F.2d 1169, 1188-1189, such consent is not voluntary." Moreover, coercion is implied when consent is obtained "under color of the badge," and the Government must show that there was no coercion in fact. (*United States v. Irion* (9th Cir. 1973) 482 F.2d 1240, 1244; *United States v. Page* (9th Cir. 1962) 302 F.2d 81, 84.)

The district court attempted to justify its conclusion that Mizera's consent was voluntary by suggesting that "voluntariness" takes on a different meaning in the context of coerced confessions than it does in the context of consent to participation in monitoring or other activities protected by the Fourth Amendment. (Although the district court found that the threatened denial of medical treatment was not coercive in the present case, it said that it would have "great concern" if the case involved a confession or "the waiver of a right associated with a fair trial.") This distinction is unfounded. Coercion does not evaporate with an assumed change in climate between the Fourth and Fifth Amendments. Nor does coercion become free choice when it is applied to obtain consent rather than to force a confession. (*United States v. Rothman, supra,* 492 F.2d 1260.)

The panel's effort to justify its conclusion is similarly unsuccessful. The panel postulates that the officers' threats did not induce Mizera's consent; rather, Mizera brought his plight upon himself. The officers, the panel says, simply required the defendant "to face up to the real world in order to obtain his cooperation;" that pressure is entirely appropriate, it adds, on analogy to pleas of guilty, quoting *Brady v. United States* (1969) 397 U.S. 742, 750.

The panel's assumption that Mizera was guilty of a crime is unsupported by the record. Mizera has not been convicted of any crime, except by the rhetoric of the officers and the speculations of the panel. The Constitution does not give law enforcement personnel the right to decide guilt or innocence, nor does

it gives courts the power to make that determination with neither a guilty plea nor a trial. But even if Mizera had been guilty of the crime for which the officers threatened prosecution and conviction, his guilt would be irrelevant in deciding the coercion issue.[4] Coercion is not acceptable whether it is applied to persons who are ultimately found guilty or to those who are ultimately found innocent. Coercion is forbidden both because it is unacceptable police conduct in our justice system and because it tends to produce involuntary words and deeds. We should be ever mindful that "if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end." *United States v. Huss* (2d Cir. 1973) 482 F.2d 38, 52.)

No analogy exists between the taking of a guilty plea by a court and the extraction of "cooperation" or a confession by law enforcement officers, without the presence of any judicial officer and without the presence of counsel. As Mr. Justice White said in *Brady*: "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he has committed the acts charged in the indictment." (397 U.S. at 748.) "Since *Gideon v. Wainwright,* 372 U.S. 335 (1963), it has been clear that a guilty plea to a felony charge without counsel and without a waiver of counsel is invalid. [Citations omitted.]" 397 U.S. at 748-49, n.6.)

The officers effectively prevented Mizera from consulting counsel after he asked to do so. That deprivation cannot be

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[4]The panel relies on Holmes v. Burr, *supra,* where there was no question of coercion. It also uses United States v. Lue (9th Cir. 1974) 498 F.2d 531, and Hampton v. United States (1976) ..... U.S. ..... [44 U.S.L.W. 4542] which are entrapment cases, holding that certain law enforcement techniques that take advantage of a subject's "predisposition" are not violative of due process. Here, the fact that extreme pressure had to be used to induce cooperation belies any notion that Mizera was predisposed to cooperate.

brushed aside. His need for counsel was evident.[5] Counsel would surely have revealed to him that the officers' "compelling" statements were deceitful. The officers told Mizera that he would serve ten years, if convicted, knowing full well that ten years was the maximum penalty for Mizera's alleged misdeed. The officers also assured Mizera of conviction, although they had to know that conviction is not a certitude. Even worse, the officers offered to drop any charges against Mizera when they had no legal power to promise immunity. Consent obtained by governmental misrepresentation is involuntary. (*United States v. Rothman, supa,* 492 F.2d at 1263; *see Fulk · v. United States* (D.C. Cir. 1967) 407 F.2d 1199, 1213 ("Of course garnering a confession by artifice is no more permissible than achieving the same result by some cruder coercion.").)

I would en banc this case to eradicate the intra-circuit conflict between *Ryan* and *United States v. Rothman, supra,* 492 F.2d 1260, and its antecedents, and to bring *Ryan* in line with controlling Supreme Court authority. On the merits, I would reverse and remand *Ryan* for a new trial free from the tainted evidence.[6]

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[5]As Mr. Justice Sutherland observed in Powell v. Alabama (1932) 287 U.S. 45:

> ". . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He requires the guiding hand of counsel at every step in the proceedings against him." (*Id.* at p. 69.)

[6]It is noteworthy that the Government's respect for Mizera's constitutional rights has been deficient in more than one instance. The panel observes that Mizera's office and residence were "bugged" prior to his grant of consent on May 19, 1972. Nevertheless, because the evidence culled from this source was said to be available from independent sources, the panel rules that its admission did not constitute error. (United States v. Ryan, No. 75-1317, at p. 8 (slip op'n, May 24, 1976).)